

## Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit

Jordan J. Paust

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# Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit

Jordan J. Paust†

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## Introduction

In March 2011, President Barack Obama announced several steps to broaden the ability of the United States "to bring terrorists to justice," including revamping the troubled military commissions process to try suspected al Qaeda operatives and other accused terrorists held at Guantanamo Bay, Cuba ("GTMO"), which had been suspended for two years.<sup>1</sup>

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1. Press Release, The White House, Office of the Press Secretary, New Actions on Guantanamo Bay and Detainee Policy (Mar. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/new-actions-guantanamo-bay-and-detainee-policy>. In his announcement, the President stated "that the American system of justice is a key part of our arsenal in the war against al Qaeda" and expressed the need "to defend our nation and the values that define who we are as a nation." *Id.* For additional information on President Obama's announcement and the context surround-

Sharp disagreement and confusion still exist with respect to the propriety of use of military commissions to try those at Guantanamo who are reasonably accused of having committed war crimes. It is the primary purpose of this Article to demonstrate why the Obama military commissions will not be a lawful means for prosecution.

First, the Obama military commissions are not regularly constituted or previously established in accordance with pre-existing laws and, therefore, they are without jurisdiction under relevant international laws. Second, they are not constituted within a theater of war or war-related occupied territory and, therefore, they are without lawful jurisdiction. Third, their use would violate several multilateral and bilateral treaties that require equal protection of the law and equality of treatment more generally and, therefore, they are without lawful power or authority under constitutionally-moored supreme laws of the United States that are binding on the President and all members of the Executive Branch, including U.S. military personnel. Fourth, they will predictably use certain procedures that violate or are highly problematic under relevant international law. Importantly, federal district courts can provide a viable and lawful alternative for prosecution if Congress will avoid limitations on their use. Additionally, in order to meet security and financial concerns with respect to use of district courts in the United States, Congress could authorize an expanded use of the United States District Court for the Southern District of Florida at GTMO.

## I. Obama's Military Commissions Are Not "Regularly Constituted," Are *Ultra Vires*, and Lack Jurisdiction

### A. Legal Requirements Recognized by the U.S. Supreme Court Cannot Be Met

#### 1. *Obama Military Commissions Are Not "Regularly Constituted"*

In its landmark opinion in *Hamdan v. Rumsfeld*,<sup>2</sup> the U.S. Supreme Court ruled that the military commission convened under President Bush to try Ahmed Hamdan, a Yemeni national captured during the U.S. armed conflict in Afghanistan, "lack[ed] power to proceed because its structure and procedures violate[d] both the UMCJ [Uniform Code of Military Justice] and the Geneva Conventions."<sup>3</sup> The Supreme Court also ruled that

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ing his proposed revival of military commissions, see Editorial, *The Prison That Won't Go Away*, N.Y. TIMES, Mar. 9, 2011, at A26; David Gardner, *Obama Savaged Over U-turn to Resume Trials for Terror Suspects at Guantanamo Bay*, DAILY MAIL (Mar. 8, 2011, 5:50 PM), <http://www.dailymail.co.uk/news/article-1363934/Barack-Obama-U-turn-resume-trials-terror-suspects-Guantanamo-Bay.html>; Richard A. Serrano, *In Obama Reversal, Military Trials Set to Resume at Gitmo*, CHI. TRIB., Mar. 6, 2011, at 20; Richard A. Serrano & David G. Savage, *First Obama-Era Gitmo Case a Legal Minefield*, CHI. TRIB., Mar. 10, 2011, at 20; *The Guantanamo Saga*, INT'L HERALD TRIB., Mar. 11, 2011, at 6.

2. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

3. *Id.* at 567.

Common Article 3 of the Geneva Conventions<sup>4</sup> “is applicable here, and . . . requires that . . . [a detainee] be tried by a ‘regularly constituted court affording all the judicial guarantees’” recognized under customary international law, and that Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”),<sup>5</sup> among other international legal instruments reflecting customary international law,<sup>6</sup> sets forth “basic protections” regarding due process that are incorporated within Common Article 3’s requirements.<sup>7</sup> Justice Stevens’ majority opinion affirmed that “regularly constituted” courts include “‘ordinary military courts’ and ‘definitely exclud[e] all special tribunals,’” and that regularly constituted means

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4. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 2516, 75 U.N.T.S. 287 [hereinafter GC]. The Geneva Conventions apply to the wars in Afghanistan, parts of Pakistan, and Iraq even though the United States is not at “war” with al Qaeda as conceptualized under the terms of the Geneva Conventions or more generally under international law. Importantly, a member of al Qaeda, like any person in the war area, is covered and has duties under certain provisions of the Geneva Civilian Convention if captured during war in Afghanistan, parts of Pakistan, or Iraq. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 160–64 (D.D.C. 2004); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUMBIA J. TRANSNAT’L L. 811, 816–20, 829–30 (2005) [hereinafter Paust, *Executive Plans*]; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 325–28 (2003); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 5–8 n.15 (2001) [hereinafter Paust, *Military Commissions*].

Importantly, any detainee who is not a prisoner of war has certain protections under the Geneva Civilian Convention and Common Article 3, which now applies in an international armed conflict (that is, there are no gaps in Geneva law that leave a person without any protections). See, e.g., GC, *supra*, arts. 3, 5, 13, 16, 27–33; *Hamdan*, 344 F. Supp. 2d at 161, 163; *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 271 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (“there is no gap between the Third and the Fourth Geneva Conventions”); IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 14, 51, 58, 595 (Jean S. Pictet ed., 1958) [hereinafter GC IV COMMENTARY]; III COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 51 n.1, 76, 423 (Jean S. Pictet ed., 1960) [hereinafter GPW III COMMENTARY]; UNITED KINGDOM MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT 145, 148, 150, 216, 225 (2004) [hereinafter UK MANUAL]; U.S. DEPARTMENT OF THE ARMY FIELD MANUAL 27-10: THE LAW OF LAND WARFARE, paras. 73, 98, 247(b) (1956) [hereinafter FM 27-10]; Derek Jinks, *Protective Parity and the Law of War*, 79 NOTRE DAME L. REV. 1493, 1504, 1510–11 (2004); Paust, *Executive Plans*, *supra*, at 817–18; Paust, *Military Commissions*, *supra*, at 6–8 & n.15; Marco Sassoli, “Unlawful Combatants”: *The Law and Whether It Needs to Be Revised*, 97 AM. SOC’Y INT’L L. PROC. 196, 197 (2003); William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 321–22 (2003). Even nationals of a neutral state are protected while they are outside “the territory of” the detaining state (for example, while outside the United States) and they are, therefore, not within any exclusion in common Article 4. See, e.g., GC, *supra*, art. 4 (indicating that neutral nationals are excluded from Part III only when they are “in the territory of” the detaining state); GC IV COMMENTARY, *supra*, at 48; UK MANUAL, *supra*, at 274; U.S. DEP’T OF THE ARMY, PAM. NO. 27-161-2, II INTERNATIONAL LAW 132 (1962); Paust, *Executive Plans*, *supra*, at 819 & n.28, 850–51 (demonstrating further that there is no distinction between persons lawfully or unlawfully within a territory).

5. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, S. EXEC. DOC. E. 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

6. See *infra* note 13.

7. *Hamdan*, 548 U.S. at 631–33 & n.66 (2006); see also *infra* note 47.

“established and organized in accordance with the laws and procedures already in force.”<sup>8</sup> Justice Kennedy, in a concurring opinion, agreed that Common Article 3 applies as “binding law,” that a “regularly constituted” court “relies upon . . . standards deliberated upon and chosen in advance,” and that a violation of Common Article 3 is a war crime.<sup>9</sup> Justice Kennedy was specific in holding that “[t]he regular military courts in our system are the courts-martial” and they “provide the relevant benchmark.”<sup>10</sup>

In view of these apt recognitions by the Supreme Court, it is simply not possible to conclude that a special military commission created *post hoc* under the 2006 or 2009 Military Commissions Acts (“MCAs”)<sup>11</sup> can meet the “regularly constituted” test mandated in Common Article 3 and the customary international law reflected therein. The military commissions created under the MCAs were not “already in force” or “chosen in advance.” They were created in order to try merely some of those captured during the war in Afghanistan and not others who have been tried in federal district courts and the commissions themselves, and the laws establishing them were enacted years after detainees at Guantanamo entered U.S. custody.

Moreover, “[i]nextricably intertwined with the question of regular constitution,” the Supreme Court stressed, “is the evaluation of the procedures governing the tribunal and whether they afford ‘all the judicial guarantees which are recognized as indispensable by civilized peoples.’”<sup>12</sup> Relevant “judicial guarantees,” the Court held, “must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977.”<sup>13</sup> Additionally, with respect to due process requirements under customary and treaty-based international law, the Court rightly recognized that “the same basic protections set forth in Article 75” are reflected in Article 14 of the ICCPR.<sup>14</sup>

The ICCPR applies wherever the U.S. exercises jurisdiction or effective control over an individual.<sup>15</sup> Customary and treaty-based human rights

8. *Hamdan*, 548 U.S. at 632.

9. *Id.* at 637, 642 (Kennedy, J., concurring in part).

10. *Id.* at 644-45; see also *id.* at 632 (noting that the government’s defense of *Hamdan*’s military commission as satisfying the requirements of Common Article 3 fails because, “[a]s Justice Kennedy explains, . . . ‘[t]he regular military courts in our system are the courts-martial established by congressional statutes.’”).

11. Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, sect. 1801-07, 123 Stat. 2190 [hereinafter 2009 MCA]; Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948b(g) (2006)) [hereinafter 2006 MCA]. Trials and proceedings under the 2006 MCA are still relevant. See 2009 MCA, *supra*, sect. 1804(a)-(c).

12. *Hamdan*, 548 U.S. at 633.

13. *Id.* at 633 n.66 (referring to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]).

14. *Id.* at 633 n.66.

15. See ICCPR, *supra* note 5, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to

reflected in the ICCPR are also those covered within the universal duty of the United States under the United Nations Charter. Article 55(c) coupled with Article 56 of the U. N. Charter mandates “universal respect for, and observance of, human rights . . . for all” persons.<sup>16</sup> There are no geographic or other contextual limitations with respect to the Charter-based duty to universally respect and observe human rights of any person of any status.<sup>17</sup> It is obvious, therefore, that human rights obligations apply at

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its jurisdiction the rights recognized in the present Covenant . . .”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, 178–79 (July 9) (holding that the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”); *Coard v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, ¶¶ 51–61 (1999), available at <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>; U.N. Econ. & Soc. Council, Situation of Detainees at Guantanamo Bay, ¶¶ 10–11, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (prepared by Leila Zerrougui, et al.); U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: United States of America, ¶¶ 10, 16, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006); U.N. Hum. Rts. Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 24, 2004) (concluding that the ICCPR requires states to apply the Covenant “to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . . [The ICCPR applies] to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of a State Party . . . . [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.”); *Id.* ¶ 11 (“[T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable.”); U.N. Hum. Rts. Comm., General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994) (ensuring the rights to “all those under a State party’s jurisdiction”) [hereinafter General Comment No. 24]; U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: Croatia, ¶ 9, U.N. Doc. CCPR/C/79/Add.15 (Dec. 28, 1992); Paust, *Executive Plans*, *supra* note 4, at 821–22 & n.40. More specifically, there is no territorial limitation set forth with respect to the absolute rights and duties contained in Article 14 of the ICCPR. The authoritative decisions and patterns of *opinio juris* noted above are part of subsequent practice and expectation relevant to proper interpretation of the treaty. See Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]. Treaties must also be interpreted in light of their object and purpose. *Id.* art. 31(1). In this instance, the general object and purpose of the ICCPR is to assure universal respect for and observance of the human rights set forth in the treaty. See ICCPR, *supra* note 5, pmbl. (recognizing “equal and inalienable rights of all;” recognizing that “everyone . . . [should] enjoy” human rights; and “[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights”).

16. U.N. Charter arts. 55(c), 56; see also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Annex, U.N. Doc. A/8208 (Oct. 24, 1970) (“Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.”).

17. See generally, Jordan J. Paust, *The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity*, 51 HARV. INT’L L.J. ONLINE 1 (2010), [http://www.harvardilj.org/2010/04/online\\_51\\_paust/](http://www.harvardilj.org/2010/04/online_51_paust/).

Guantanamo and within courts in the United States.

Within the Americas (and, therefore, at GTMO and within courts in the United States), the American Declaration of the Rights and Duties of Man<sup>18</sup> requires similarly that “[e]very person accused of an offense has the right . . . to be tried by courts previously established in accordance with pre-existing laws.”<sup>19</sup> The right and concomitant duty reflected in Article XXVI of the American Declaration is binding on the United States through the Charter of the Organization of American States (“O.A.S. Charter”).<sup>20</sup> Quite obviously, Obama military commissions created *post hoc* under the 2006 or 2009 MCA cannot meet the requirement of having been “previously established in accordance with pre-existing laws.”

The 2006 MCA attempted to deny certain persons the right “to invoke the Geneva Conventions as a source of rights.”<sup>21</sup> This was changed in the 2009 MCA in an attempt to deny the right to “invoke the Geneva Conventions as a basis for a private right of action,”<sup>22</sup> but not otherwise as a source of rights or for other purposes. For six reasons, such attempts ulti-

18. American Declaration on the Rights and Duties of Man, art. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948, at 38, *reprinted in* 43 AM. J. INT’L L. SUPP. 133 (1949) [hereinafter American Declaration].

19. *Id.* art. XXVI.

20. See Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 45 (July 14, 1989); Res. No. 3/87, Case 9647, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶ 48 (1987); Res. No. 23/81, Case 2141, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶¶ 15-16 (1981) (stating that “[a]s a consequence of Article 3j, 16, 51e, 112 and 150” the O.A.S. Charter, the American Declaration is binding on the U.S. government); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF THE INHABITANTS IN ECUADOR, CH. VIII, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997) (“The American Declaration . . . continues to serve as a source of international obligation for all member states.”); see also RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 802-04 (3d ed. 1995); MYRES S. MCDUGAL, ET. AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 198, 316 (1980); DAVID WEISSBRODT, ET. AL., INTERNATIONAL HUMAN RIGHTS 598-600 (3d ed. 1996).

Within the Americas, the United States is also bound to take no action inconsistent with the object and purpose of the American Convention on Human Rights, which would necessarily include the obligation in Article 8(1) of the Convention to provide every person accused of a crime the right to trial before “a competent, independent, and impartial tribunal, previously established by law.” Organization of American States, American Convention on Human Rights art. 8(1), Nov. 22, 1969, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 143 [hereinafter American Convention on Human Rights]. This obligation arises because the United States has signed the treaty while awaiting ratification. See Vienna Convention, *supra* note 15, art. 18.

21. 2006 MCA, *supra* note 11, sect. 5(a). This attempt might still be relevant under the 2009 MCA. See 2009 MCA, *supra* note 11, sect. 1804. However, the intent to deny and the denial of rights under Geneva law necessarily creates war criminal responsibility for those who had or share that intent and are perpetrators or complicitors, as well as those (including judges) who “declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.” Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, Annex, art. 23(h), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. Judges, prosecutors, and other lawyers were convicted at Nuremberg of this type of war crime and others. See, e.g., United States v. Altstoetter (The Justice Case), *reprinted in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1951).

22. See 2009 MCA, *supra* note 11, sect. 1802 (adding § 948b(e)).

mately should not prevail. First, the 2006 and 2009 MCAs do not limit the use of Geneva law to obviate jurisdiction or the duty of independent courts to apply such law as a limit to their jurisdiction. Second, they do not prohibit the use of customary international law reflected in Common Article 3 of the Geneva Conventions and Article 75 of Geneva Protocol I. Third, they do not limit use of the ICCPR, the U.N. Charter, the American Declaration of the Rights and Duties of Man, the O.A.S. Charter, the American Convention on Human Rights, or the customary international law reflected therein.<sup>23</sup> Fourth, congressional power to set up a military commission under Article I, § 8, clause 10 of the U.S. Constitution to try “Offences against the Law of Nations”<sup>24</sup> is constitutionally limited by the law of nations;<sup>25</sup> Congress cannot lawfully move beyond the law of nations to deny Geneva-based rights while permitting prosecution of Geneva-based duties.<sup>26</sup> Fifth, the attempts to deny judicial use of certain treaty law as a

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23. See also *infra* Parts II.B, IV.

24. U.S. CONST. art. I, § 8, cl. 10.

25. See 11 Op. Att’y Gen. 297, 299–300 (1865):

To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations; but Congress has the power to make rules for the government of the army and navy. From the very face of the Constitution, then, it is evident that the laws of nations do constitute a part of the laws of the land. But very soon after the organization of the federal government, Mr. Randolph, the Attorney General, said: “The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modification on some points of indifference.” (See 1 Op. Att’y Gen. 27.) The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as a part of the law of the land. Hence Congress may define those laws, but cannot abrogate them, or, as Mr. Randolph says, may “modify on some points of indifference.”

That the laws of nations constitute a part of the laws of the land is established on the face of the Constitution, upon principle and by authority.

But the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress . . . .

Congress can declare war. When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Under the power to define those laws, Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people . . . . Congress, not having defined, as under the Constitution it might have done, the laws of war, we must look to the usage of nations to ascertain the powers conferred in war, on whom the exercise of such powers devolve, over whom, and to what extent do those powers reach, and in how far the citizen and the soldier are bound by the legitimate use thereof.

26. See *id.*; *Bas v. Tingy*, 4 U.S. 37, 43 (1800) (Chase, J.) (“Congress is empowered to declare a general war, or congress may wage a limited war . . . . If a general war is declared, its extent and operations are . . . restricted and regulated by the *jus belli*, forming a part of the law of nations.”); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 217–30 (2008) (documenting many relevant affirmations by Founders, Framers, and the judiciary that Congress is



source of rights before the courts and thereby control judicial decision is a violation of the separation of powers.<sup>27</sup> Sixth, even if they did not violate the separation of powers, the 2006 and 2009 MCAs are necessarily trumped by rights under the Geneva Conventions under two venerable exceptions to the last in time rule that have been recognized in several decisions of the U.S. Supreme Court: (1) the “rights under” treaties exception, which requires the primacy of “rights under” treaties over subsequent inconsistent legislation,<sup>28</sup> and (2) the law of war exception, which guarantees the primacy of the international laws of war over subsequent inconsis-

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bound by the law of nations and cannot abrogate it) [hereinafter Paust, *In Their Own Words*]; see also *United States v. Palmer*, 16 U.S. 610, 641-42 (1818) (Johnson, J., dissenting) (“Congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts.”); *Penhallow v. Doane’s Adm’rs*, 3 U.S. 54, 74 (1795) (Paterson, J.) (regarding capture by an armed brigantine acting on commission and authority of Congress, Congress possesses the “powers of war” and a “decision of the question . . . [which] is a part of the power and law of war . . . must be governed by the law of nations”); *Ross v. Rittenhouse*, 2 U.S. 160, 162 (1792) (“municipal law . . . may . . . facilitate or improve . . . [the law of nations], provided the great universal law remains unaltered”); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 F. 746, 751 (2d Cir. 1922) (quoting *Miller v. United States*, 78 U.S. 268, 314 (1870) (Field, J., dissent) (“war powers of the government” have a “limitation to which their exercise is subject [which] is the law of nations”)); *United States ex rel. Schluter v. Watkins*, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) (quoting Remarks by Representative Albert Gallatin, 8 ANNALS OF CONG. 1980 (1798) (“By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and to treaties.”)); *United States v. Darnaud*, 25 F. Cas. 754, 759-60 (C.C.E.D. Pa. 1855) (“if the Congress . . . were to call upon courts of justice to extend the jurisdiction of the United States beyond the limits . . . [set by the law of nations], it would be the duty of courts of justice to decline”); Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529, 539-40 (2010) (addressing a 1793 oral argument of John Marshall before Chief Justice Jay and Justice Iredell during which Marshall argued that, with respect to seizure of property during war, the government can pass any law not inconsistent with its constitution and not contrary to the laws of war).

27. See Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 412-18 (2007) [hereinafter Paust, *Above the Law*].

28. See JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 104-07, 137-42 & nn.40-49, 53-57 (2d ed. 2003) [hereinafter PAUST, *LAW OF THE UNITED STATES*]; Paust, *Above the Law*, *supra* note 27, at 379-80 & nn.91-92, 413 n.199. Cases addressing the “rights under” treaties exception include: *Jones v. Meehan*, 175 U.S. 1, 32 (1899); *Holden v. Joy*, 84 U.S. 211, 247 (1872); *Reichart v. Felps*, 73 U.S. 160, 165-66 (1867); *Wilson v. Wall*, 73 U.S. 83, 89 (1867); *Dred Scott v. Sandford*, 60 U.S. 393, 631-32 (1857) (Curtis, J., dissenting); *Mitchel v. United States*, 34 U.S. 711, 749, 755 (1835); see also *Smith v. Stevens*, 77 U.S. 321, 327 (1870) (holding that a joint resolution of Congress could not relate back to give validity to a land conveyance that was void under a treaty); *Marsh v. Brooks*, 49 U.S. 223, 232-33 (1850) (holding that an 1836 Act of Congress could not “help the patent, it being of later date than the treaty” of 1824 which had conferred part of the title to property in others); *Chase v. United States*, 222 F. 593, 596 (8th Cir. 1915) (“Congress has no power . . . to affect rights . . . granted by a treaty.”), *rev’d on other grounds*, 245 U.S. 89 (1917); *Elkison v. Delisesseline*, 8 F. Cas. 493, 494-96 (C.C.D.S.C. 1823) (Johnson, J.) (holding that a state law attempting to allow seizure of “free negroes and persons of color” on ships that come into state harbors directly conflicts with the “paramount and exclusive” federal commerce power, “the treaty-making power,” and “laws and treaties of the United States” by “converting a right into a crime;” and a plea of necessity to protect state security does not obviate the pri-

tent legislation.<sup>29</sup>

## 2. *Obama Military Commissions Lack Jurisdictional Competence*

With respect to limitations on power to create a military commission and lack of jurisdictional competence, the Supreme Court recognized that there are certain preconditions for jurisdiction, including:

First, “[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander.” The “field of command” in these circumstances means the “theatre of war.” Second, the offense charged “must have been committed within the period of the war.” No jurisdiction exists to try offenses “committed either before or after the war.”<sup>30</sup>

The Court noted that “Hamdan’s tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities.”<sup>31</sup> As noted in Part I.B. below, Obama’s military commissions cannot comply with the additional requirement that a military commission be created in the “theatre of war” or in a war-related occupied territory.

### B. Further Supreme Court Recognition of Limitations With Respect to Place

A further limitation on the President’s ability to convene military commissions is that the power to set up a military commission and its jurisdictional competence are limited to situations in which an actual war is occurring (to which the laws of war apply) and they apply only within a war zone (that is, within an actual theater of war such as Afghanistan or a war-related occupied territory).<sup>32</sup>

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macy of the laws and treaties of the U.S. Further, a restriction of a treaty right by legislation, “even by the general government,” cannot prevail.)

29. The second exception to the last-in-time rule in this case is the law-of-war exception, which guarantees the primacy of the international laws of war over congressional legislation. See, e.g., *Miller v. United States*, 78 U.S. 268, 315 (1870) (Field, J., dissenting); *Bas*, 4 U.S. at 43 (holding that “[i]f a general war is declared [by Congress], its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations”—thus recognizing that congressional power is restricted by the laws of war); 11 Op. Att’y Gen. 297, *supra* note 25, at 299–300; *Schlueter*, 67 F. Supp. at 564 (quoting Remarks by Representative Albert Gallatin, 8 ANNALS OF CONG. 1980 (1798)); see also *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (the war power “tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law”), *overruled on other grounds by* *Girouard v. United States*, 328 U.S. 61, 69 (1945); *Tyler v. Defrees*, 78 U.S. 331, 354–55 (1871) (Field, J., dissenting).

30. *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006).

31. *Id.* at 612.

32. See *The Grapeshot*, 76 U.S. 129, 132–33 (1860) (jurisdiction exists “wherever the insurgent power was overthrown” and, therefore, within the theater of war); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 836 (2d ed. 1920); Paust, *Military Commissions*, *supra* note 4, at 5 & n.14, 25 n.70, 26–27; see also *Madsen v. Kinsella*, 343 U.S. 341, 346–48 (1952) (military commissions are “war courts,” “related to war,” and are proper in a war-related occupied enemy territory “in time of war”); *Duncan v.*

As Colonel Winthrop recognized in his classic study of military law: "A military commission . . . can legally assume jurisdiction only of offences committed within the field of command of the convening commander," and regarding military occupation, "cannot take cognizance of an offence committed without such territory . . . . The place must be the theater of war or a place where military government or martial law may be legally exercised; otherwise a military commission . . . will have no jurisdiction."<sup>33</sup> The military commission set up within the United States during World War II and recognized in *Ex parte Quirin*, for example, was created during war in what was then an actual theater of war to prosecute enemy belligerents for alleged violations of the laws of war that occurred within the United States (Florida and New York) and within the convening authority's active field of military command—the Eastern Defense Command of the United States Army.<sup>34</sup>

What is unavoidably problematic with respect to military commission jurisdiction at GTMO is the fact that the U.S. military base at Guantanamo is neither in an actual theater of war, nor in a war-related occupied territory.<sup>35</sup> Consequently, a military commission at Guantanamo is not properly constituted and is without lawful jurisdiction. Furthermore, it is obvious that alleged violations of the laws of war by detainees during a war in Afghanistan did not occur in Cuba or within the field of command of the convening commander.

An additional problem is that the Obama military commissions are not limited to prosecutions of what are actually war crimes. For example, "conspiracy" is chargeable under the MCAs,<sup>36</sup> but conspiracy as such is not a violation of the laws of war. The Supreme Court recognized in *Hamdan* that a regularly constituted law of war military commission can be used only to prosecute violations of the laws of war and that conspiracy as such has not been recognizably covered.<sup>37</sup> Other crimes chargeable under

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Kahanamoku, 327 U.S. 304, 324 (1946) (jurisdiction exists in "occupied enemy territory"); *id.* at 326 (Murphy, J., concurring) (jurisdiction exists "[o]nly when a foreign invasion or civil war actually closes the courts"); *In re Yamashita*, 327 U.S. 1, 11, 20 n.7 (1946); *Coleman v. Tennessee*, 97 U.S. 509, 515-17 (1878).

33. WINTHROP, *supra* note 32, at 836.

34. *Ex parte Quirin*, 317 U.S. 1, 22 & n.1 (1942).

35. See Paust, *Military Commissions*, *supra* note 4, at 25 n.70; see also *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (describing Guantanamo as territory "far removed from any hostilities" and not in an actual theater of war).

36. 2009 MCA, *supra* note 11, sect. 1802, § 950t(29); 2006 MCA, *supra* note 11, sect. 3(a)(1), § 950v(b)(28).

37. *Hamdan v. Rumsfeld*, 548 U.S. 557, 598-613 (2006); see also *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—*Joint Criminal Enterprise*, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003) ("Criminal liability pursuant to joint criminal enterprise [JCE] is not a liability for membership or for conspiracy to commit crimes."); George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT'L L. 427, 446 (2007) ("neither conspiracy nor membership in a terrorist organization meets the standard of an international crime"). But see *United States v. al Bahlul*, CMCR 09-001 (U.S. Ct. of Mil. Comm'n Rev. Sept. 9, 2011). Concerning JCE liability before international criminal tribunals, see, for example, JORDAN J. PAUST, ET AL., *INTERNATIONAL CRIMINAL LAW* 32-33, 37-38 (3d ed. 2007). The 2009 MCA, contrary to *Hamdan*, seeks to

the MCA that are not war crimes include (1) “providing material support for terrorism,”<sup>38</sup> unless the perpetrator is actually abetting a war crime of terrorism;<sup>39</sup> (2) “wrongfully aiding the enemy,”<sup>40</sup> which is merely a type of

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extend military commission jurisdiction from “violations of the law of war” to “other offenses triable by military commission.” 2009 MCA, *supra* note 11, sect. 1802, § 948b(a).

38. For the text of the MCA provision, see 2009 MCA, *supra* note 11, sect. 1802, § 950t(25). That providing material support for terrorism is not generally considered a war crime, see Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Addendum*, Human Rights Council, 12, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) (“the offences listed in Section 950v(24)-(28) of the [MCA] (. . . providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war”); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 177 (2008) (“providing material support to terrorism . . . as a war crime seems unprecedented”); Samuel T. Morison, *History and Tradition in American Military Justice*, 33 U. PA. J. INT’L L. 121, 124 & n.10 (2011) (“this is a novel statutory offense that was not even conceived until the mid-1990s, and has never been considered a law-of-war offense by any other nation”); T. Jack Morse, *War Criminal or Just Plain Felon? Whether Providing Material Support for Terrorism Violates the Laws of War and Is Thus Punishable By Military Commission*, 26 GA. ST. U.L. REV. 1061, 1079-82 (2010) (arguing that providing material support for terrorism is not a war crime).

39. That terrorism can be a violation of the laws of war, see, for example, GC, *supra* note 4, art. 33; Geneva Protocol I, *supra* note 13, art. 51(2); PAUST, ET AL., *supra* note 37, at 36. Importantly, however, the MCAs’ definition of terrorism is manifestly overbroad because it does not require an intent to produce terror or a terror outcome and might merely involve “wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct.” 2009 MCA, *supra* note 11, sect. 1802, § 950t(24). That an objective definition of terrorism requires an intent to produce terror and a terror outcome, see G.A. Res. 49/60, Annex, ¶ 3, U.N. Doc. A/Res/49/60 (Feb. 17, 1995) (defining terrorism as “[c]riminal acts intended or calculated to provoke a state of terror . . . for political purposes”); PAUST, ET AL., *supra* note 37, at 698 n.14; Jordan J. Paust, *Terrorism’s Proscription and Core Elements of an Objective Definition*, 8 SANTA CLARA J. INT’L L. 51, 59 (2010); Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 701, 703-05 (1987).

40. For the text of the MCA provision, see 2009 MCA, *supra* note 11, sect. 1802, § 950t(26) (“Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy . . .”). That “wrongfully providing aid to the enemy” is not generally considered a war crime, see *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (holding that the acts of “substantially support[ing]” an enemy and “directly support[ing] hostilities” are not proven to reflect violations of the laws of war); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69, 76-77 (D.D.C. 2009) (Bates, J.). The test under the laws of war with respect to lawful targeting of civilians (that is, all of those who are not privileged combatants) allows the targeting of those who “take a direct part in hostilities,” not those who merely directly or substantially “support” hostilities. See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 637, 270-72 (2010). The test under the laws of war for detention of civilians (that is, non-prisoners-of-war) in one’s own territory requires that the person be definitely suspected of or engaged in activities hostile to the security of the detaining power; and in occupied territory, the test requires that the person be under definite suspicion of activity hostile to the security of the occupying power. See GC, *supra* note 4, art. 5; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 512-13 (2003) [hereinafter Paust, *Judicial Power*]; see also GC IV COMMENTARY, *supra* note 4, at 53 (focusing on persons who are “spies, saboteurs or

crime against the state or a pure political offense<sup>41</sup> that can rightly reach only those who owe allegiance to the United States; and (3) “spying,”<sup>42</sup> which is also merely a crime against the state and not a violation of the law of war.<sup>43</sup>

## II. Obama Military Commissions Necessarily Violate Treaties Requiring Equal Protection

### A. Multilateral Treaties

Under the Military Commissions Act, there is unavoidable per se discrimination on the basis of national origin, denial of equality of treatment and equal protection of the law, and denial of justice to aliens. Under the 2006 and 2009 MCA, only an “alien unprivileged enemy belligerent is subject to trial by military commission.”<sup>44</sup> This provision necessarily violates several relevant treaty-based and customary international laws requiring the United States to give detainees equal protection under the law.

For example, U.S. military commissions must comply with Article 14 of the ICCPR, which applies (1) through Common Article 3 of the 1949 Geneva Conventions,<sup>45</sup> (2) directly as independent treaty law of the United States,<sup>46</sup> and (3) as relevant customary international law. Importantly,

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irregular combatants” or “[t]hose who take part in the struggle”). Supporting hostile activities is not the same as having engaged in hostile activities.

41. PAUST, ET AL., *supra* note 37, at 351 n.2.

42. See 2009 MCA, *supra* note 11, sect. 1802, § 950t(27).

43. That spying is not an offense under the laws of war, see *United States ex rel. v. McDonald*, 265 F. 754, 762 (E.D.N.Y. 1920) (“A spy may not be tried under the international law when he returns to his own lines, even if subsequently captured, and the reason is that, under the international law, spying is not a crime, and the offense which is against the laws of war consists of being found during the war in the capacity of a spy.”); PAUST, ET AL., *supra* note 37, at 699 n.17; FM 27-10, *supra* note 4, para. 77 (Spying is “no offense against international law. Spies are punished not as violators of the laws of war.”); see also *Smith v. Shaw*, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (holding that a civilian who allegedly was an enemy spy exciting mutiny and insurrection during a war could not be detained by the U.S. military for trial in a military tribunal). Spying is a crime against the state or “pure political offense” for which extradition is not allowed. See PAUST, ET AL., *supra* note 37, at 351.

44. 2009 MCA, *supra* note 11, sect. 1802, § 948(c) (“Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.”); 2006 MCA, *supra* note 11, sect. 3(a)(1) (“alien unlawful enemy combatant is subject to trial by military commission”).

45. Article 3 incorporates by express reference all due process guarantees recognized under customary international law. See, e.g., GC, *supra* note 4, art. 3. For more concerning the incorporation of customary law reflected in Article 14 of the ICCPR by reference in Common Article 3 of the Geneva Conventions, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 & n.66 (2006); Paust, *Military Commissions*, *supra* note 4, at 7 n.15, 12 n.26.

46. When it ratified the ICCPR, the United States placed a declaration in its instrument of ratification that attempted to function as a declaration of partial (not full or general) non-self-execution for a very limited purpose. The declaration expressly did not apply to Article 50 of the ICCPR, which, in self-executing language, expressly and unavoidably requires that all of the provisions of the treaty “shall” apply within the United States (and, therefore, in any court or tribunal in the United States) “without any limitations or exceptions.” See ICCPR, *supra* note 5, art. 50. Further, the Executive

Article 14 of the ICCPR reflects a minimum set of customary and treaty-based human rights to due process guaranteed to all persons in all circumstances by customary international law reflected therein,<sup>47</sup> and also by and through Articles 55(c) and 56 of the U.N. Charter.<sup>48</sup> These rights include those encompassed within the mandate that “[a]ll persons shall be equal before the courts and tribunals” and the express right of all persons “in full equality” to “a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>49</sup> The ICCPR also requires that all

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Explanation assured that the intent was merely to clarify that the treaty itself “will not create a private cause of action in U.S. courts.” See S. EXEC. DOC. NO. 102-23, at 19 (1992); JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE UNITED STATES* 85-87 & n.7, (2d ed. 2005); PAUST, *LAW OF THE UNITED STATES*, *supra* note 28, at 361-62. Therefore, the declaration does not limit the reach of Article 50 or the use of the due process and equal protection provisions defensively in a criminal proceeding. See *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (indicating that, despite the declaration, the ICCPR is supreme law of the land); *United States v. Duarte-Acero*, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (stating that the declaration does not apply when raising “ICCPR claims defensively”); PAUST, VAN DYKE & MALONE, *supra*, at 85-87 & n.7, 517 n.46; Ruth Wedgwood, Remarks at the 85th Annual Meeting of the American Society of International Law (Apr. 18, 1991), in 85 AM. SOC’Y INT’L L. PROC. 139, 141 (1991). Additionally, the declaration is not relevant to the universal reach of customary human rights to due process (now reflected in Article 14 of the ICCPR), customary prohibitions of “denial of justice” to aliens, or customary human rights norms *jus cogens*. To the extent that the U.S. declaration attempted to deny use of the ICCPR in a domestic court, it would be void *ab initio* as a matter of law. See PAUST, *LAW OF THE UNITED STATES*, *supra* note 28, at 361, 379 n.1.

47. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-33 & n.66 (2006) (recognizing that Article 75 of Geneva Protocol I, which sets forth most of the same due process guarantees, describes many of the “trial protections that have been recognized by customary international law”); see also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 352-71* (2005) (citing multiple rights listed in Article 14 as customary international legal rights of due process); Michail Wladimiroff, *Rights of Suspects and Accused*, in 1 *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS* 430-31 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Paust, *Military Commissions*, *supra* note 4, at 12 & n.26; *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 45-47 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); William J. Aceves, *International Decisions: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 94 AM. J. INT’L L. 555, 559 (2000); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 106, U.N. Doc. S/25704 (May 3, 1993); Evelyn Schmid, *The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights*, 1 GÖTTINGEN J. INT’L L. 29, 30, 37-40 (2009) (stating that rights reflected in GC Common Article 3 reflect a minimum set of customary and treaty-based rights that, as “other obligations,” cannot be derogated from under Article 4(1) of the ICCPR). In its General Comment No. 24, the Human Rights Committee noted that “a general reservation to the right to a fair trial would not be” permissible because of the customary, non-derogable, and peremptory character *jus cogens* of the human right to a fair trial. See General Comment No. 24, *supra* note 15, ¶ 8. Additionally, the Committee warned that a reservation attempting to deny use of the ICCPR in a domestic court would be void *ab initio* as a matter of law. *Id.* ¶¶ 7-9, 11-12, 18; see also *supra* note 46.

48. On the universal reach of the U.N. Charter’s obligations, see *supra* notes 16-17 and accompanying text.

49. ICCPR, *supra* note 5, art. 14(1) & (3).

persons subject to a state's jurisdiction be free from a "distinction of any kind, such as . . . national or social origin"<sup>50</sup> and mandates in clear and unavoidable language that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."<sup>51</sup> The ICCPR further reinforces that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . national or social origin."<sup>52</sup> Obama's military commissions under the MCA, which are expressly designed only for prosecution of certain aliens, unavoidably involve national or social origin discrimination<sup>53</sup> and a denial of equal protection of the law in violation of customary and treaty-based human rights law.

The American Declaration of the Rights and Duties of Man reflects the same type of individual rights and they are binding within this hemisphere on all parties to the O.A.S. Charter.<sup>54</sup> Article II of the Declaration affirms that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration."<sup>55</sup> Article XXVI recognizes that "[e]very person accused of an offense has the right . . . to be tried by courts previously established in accordance with pre-existing laws."<sup>56</sup> Article 1 of the American Convention on Human Rights affirms that "all persons subject to . . . [the] jurisdiction" of a party shall have "the free and full exercise of" rights reflected in the Convention "without any discrimination for reasons of . . . national or social origin."<sup>57</sup> Article 24 affirms that "All persons are equal before the law. Consequently, they are entitled, without discrimina-

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50. *Id.* art. 2(1).

51. *Id.* art. 26; *see also id.* art. 14(3); Universal Declaration of Human Rights arts. 2, 7, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]. On the nature of the Universal Declaration as (1) customary international law, and (2) an authoritative aid for interpretation of human rights protected by and through the U.N. Charter, *see Filartiga v. Pena-Irala*, 630 F.2d 876, 882-83 (2d Cir. 1980); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 796-97 (D. Kan. 1980); Memorandum for the United States as Amicus Curiae at 9, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146; McDUGAL, ET. AL, *supra* note 20, at 272-74, 302, 325-30; PAUST, LAW OF THE UNITED STATES, *supra* note 28, at 246 n.372, 286 n.595, 436 n.48; LILICH & HANNUM, *supra* note 20 (addressing the U.S. Memorial before the International Court of Justice in Case Concerning United States Diplomatic Staff in Tehran (*United States v. Iran*), 1980 I.C.J. Pleadings 182 & n.36 (Jan. 12, 1980) (recognizing that articles 3, 5, 7, 9, 12, and 13 reflect customary international law)).

52. ICCPR, *supra* note 5, art. 26.

53. On the prohibition of national or social origin discrimination, *see* ICCPR, *supra* note 5, arts. 2, 26; UDHR, *supra* note 51, arts. 2, 7; Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. 16, 57 (June 21) ("To establish instead, and to enforce, distinctions, exclusions, restrictions, and limitations exclusively based on grounds of . . . national or ethnic which constitute a denial of fundamental human rights is a flagrant violation of the . . . [U.N.] Charter."). The same human rights provisions prohibit discrimination on the basis of "status," which should cover, for example, discrimination on the basis of military or nonmilitary status.

54. *See generally supra* note 20.

55. American Declaration, *supra* note 18, art. II.

56. *Id.* art. XXVI.

57. American Convention on Human Rights, *supra* note 20, art. 1.

tion, to equal protection of the law.”<sup>58</sup>

These treaty-based requirements of equal protection and due process can also inform the meaning of Fifth Amendment requirements that govern appellate proceedings in the U.S. and trials at GTMO in territory under special U.S. control.<sup>59</sup>

## B. Bilateral Treaties

Additionally, bilateral friendship, commerce, and navigation (“FCN”) treaties often require access to courts and equality of treatment.<sup>60</sup> This is clearly the case with respect to nationals of Yemen, Pakistan,<sup>61</sup> and Saudi Arabia.<sup>62</sup> For example, as mandated by the U.S. treaty with Yemen:

Subjects of His Majesty the King of the Yemen in the United States of America and nationals of the United States of America in the Kingdom of the Yemen shall be received and treated in accordance with the requirements and practices of generally recognized international law. In respect of their persons, possessions and rights, such subjects or nationals shall enjoy the fullest protection of the laws and authorities of the country, and shall not be treated in any manner less favorable than the nationals of any third country.<sup>63</sup>

As noted, Obama’s military commissions merely have jurisdiction over certain aliens, not all aliens and not U.S. nationals, and the commissions’ procedural standards were designed to be less than those that pertain to a federal district court or even in a general court-martial. Therefore, the conclusion is unavoidable that they are special military commissions that deny equality of treatment. Yet, the MCA did not mention the FCN treaty with

58. *Id.* art. 24.

59. See generally *Boumediene v. Bush*, 553 U.S. 723, 755–65 (2008); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66 (1990) (noting that the Fourth Amendment is different from the Fifth and Sixth Amendments, which, on their face, can reach aliens abroad); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); *Downes v. Bidwell*, 182 U.S. 244, 382–83, 385 (1901) (Harlan, J., dissenting); *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885); *United States v. Tiede*, 86 F.R.D. 227, 242, 244 (U.S. Ct. for Berlin 1979); Jordan J. Paust, *Boumediene and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351, 353–56 (2009).

60. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713(2) cmt. h, note 3 (1987) [hereinafter RESTATEMENT]. See generally *Kolovrat v. Oregon*, 366 U.S. 187, 191, 196 (1961); *Asakura v. City of Seattle*, 265 U.S. 332, 340–41 (1924); Robert R. Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT’L L. 20 (1953). FCN treaties are typically self-executing, especially since they often use mandatory “shall” language and address rights of individuals, which makes them self-executing. See PAUST, VAN DYKE & MALONE, *supra* note 46, at 275, 288–89, 322 (addressing the “shall” and “rights” tests and implied-rights tests for self-execution status).

61. Treaty of Friendship and Commerce between the United States of America and Pakistan arts. I, V, U.S.-Pak., Nov. 12, 1959, 12 U.S.T. 110, 404 U.N.T.S. 259.

62. Provisional Agreement Between the United States of America and the Kingdom of Saudi Arabia in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce and Navigation art. II, U.S.-Saudi Arabia, Nov. 7, 1933, E.A.S. 53.

63. Agreement Relating to Friendship and Commerce art. III, U.S.-Yemen, May 4, 1946, 60 Stat. 1782.



Yemen or any other FCN treaty. Under venerable and binding Supreme Court decisions, the last in time rule will not apply unless there is a clear and unequivocal expression of congressional intent to override a treaty and there was none in this instance.<sup>64</sup> Even if such had occurred, the rights under treaties exception would necessarily apply and assure the continued primacy of FCN treaty-based rights to equal treatment.<sup>65</sup>

### III. Significant Procedural Problems Still Persist With the Special Military Commissions

The 2009 MCA states clearly that the Secretary of Defense

may make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter.<sup>66</sup>

Therefore, MCA procedures might not provide equal treatment and equal protection with respect to prosecutions in U.S. courts-martial or in federal district courts, and certain procedural rules set forth in the MCA are calculated to deny such guarantees. The attempt to deviate from normal procedural guarantees available in general courts-martial whenever the Secretary of Defense prefers does not make sense when one understands that courts-martial, with their panoply of fair procedures, have been used for decades to prosecute crimes committed in circumstances involving military and intelligence operations during hostilities.<sup>67</sup>

With respect to the need for fair procedure and fair rules of evidence, many of the same procedural problems identified by the Supreme Court in *Hamdan* occur in the Military Commissions Act. For example, the 2009 MCA does not comply with the customary minimum due process guarantee to confront witnesses that is reflected in Article 14(3)(e) of the ICCPR, which allows the accused "[t]o examine, or have examined, the witnesses

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64. See *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (stating that a "congressional expression [to override is] necessary"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963) (holding that to shift from the normal approach regarding allocations of concurrent jurisdiction under international law, "[t]here must be present the affirmative intention of Congress clearly expressed," quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)); *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified [domestically] by a later statute unless such purpose on the part of Congress has been clearly expressed."); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345-46 (1925) (holding that the "Act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude"); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902) (stating that the "purpose . . . [to override] must appear clearly and distinctly from the words used" by Congress); PAUST, VAN DYKE & MALONE, *supra* note 46, at 153-54 (citing additional cases); PAUST, LAW OF THE UNITED STATES, *supra* note 28, at 99, 101, 120, 125 n.3.

65. See PAUST, LAW OF THE UNITED STATES, *supra* note 28, at 104-05.

66. 2009 MCA, *supra* note 11, sect. 1802, § 949a(b).

67. See Randy James, *A Brief History of the Court Martial*, TIME (Nov. 18, 2009), <http://www.time.com/time/nation/article/0,8599,1940201,00.html>.

against him and to obtain the attendance and examination of witnesses on his behalf.”<sup>68</sup> Rather, the 2009 MCA merely states that an accused has a right “to cross examine the witnesses who testify”<sup>69</sup> and does not cover witnesses who do not testify. Moreover, defense counsel “shall [merely] have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations specified by the Secretary of Defense,”<sup>70</sup> although the “opportunity . . . shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.”<sup>71</sup> Also problematic in this regard is the fact that unsworn statements and “[h]earsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted” under certain circumstances.<sup>72</sup> Classified information can be admit-

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68. ICCPR, *supra* note 5, art. 14(3)(e); see also American Convention on Human Rights, *supra* note 20, art. 8(2)(f) (“the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts”); Geneva Protocol I, *supra* note 13, art. 75(4)(g); Paust, *Military Commissions*, *supra* note 4, at 10, 14.

69. 2009 MCA, *supra* note 11, sect. 1802, § 949a(b)(2)(A).

70. *Id.*, sect. 1802, § 949j(a)(1).

71. *Id.*

72. *Id.*, sect. 1802, § 949a(b)(3)(D). This is similar to the 2006 MCA. See 2006 MCA, *supra* note 11, sect. 3(a)(1), § 949a(b)(2)(E)(i). On the problematic nature of this provision, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 652 (2006) (Kennedy, J., concurring) (“The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability . . . [including] admission of unsworn statements . . . [and] coerced declarations.”). For trends and decisions under human rights law concerning examination of witnesses reflected in the ICCPR, see Kweku Vanderpuye, *Traditions in Conflict: The Internationalization of Confrontation*, 43 CORNELL INT’L L.J. 513, 538–46 (2010). For criticisms of U.S. military commission procedures and actual processes more generally, see David Cole, *Against Citizenship as a Predicate for Basic Rights*, 75 FORDHAM L. REV. 2541, 2543–54 (2007); Benjamin Davis, *No Third Class Process for Foreigners*, 103 NW. U. L. REV. COLLOQUY 88, 91–92 (2008); Joshua L. Dratel, *Military Commission Mythology*, 41 U. TOLEDO L. REV. 783, 787–89 (2010); Eugene R. Fidell, *Charm Offensive in Lilliput: Military Commissions*, part 3.1, (Nov. 11, 2011) (forthcoming manuscript) (on file with the author and St. Louis Univ. School of Law) (noting “a welter of ethical issues”); David J.R. Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo*, 60 DUKE L.J. 1367, 1376, 1403–06 (2011) (“[S]even prosecutors have resigned from the Office of Military Commissions Prosecution, citing various ethical concerns and problems with the fairness of proceedings,” including Colonel Morris Davis, former Chief Prosecutor, in 2007, and Lieutenant Colonel Darrel Vandeveld in 2008.); Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 1005 (2009) (noting that 2006 MCA continued “to be perceived as illegitimate overall due to incomplete conformity”); *id.* at 1007–08 (stating that the selective use of courts-martial procedures demonstrated a lack of due process and equal protection); Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. WEST. INT’L L.J. 135, 150 (2008); Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 145–46 (2010); Edward F. Sherman, *Terrorist Detainee Policies: Can the Constitutional and International Law Principles of the Boumediene Precedents Survive Political Pressures?*, 19 TULANE J. INT’L & COMP. L. 207, 218–19, 243–45 (2010) (questioning the commissions’ procedural fairness); David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353 (2008). *C.f.* Morris Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, at 15 (“I concluded that full, fair and open trials were not possible.”); Josh Meyer, *For Lawyer, Trial Was Tribulation*, L.A. TIMES, Oct. 12, 2008,

ted without an opportunity to confront and question persons who prepared the information.<sup>73</sup> Such information can be admitted under the 2006 MCA by “substitution of a portion or summary of the information” or through “substitution of a statement admitting relevant facts that the classified information would tend to prove,”<sup>74</sup> and under the 2009 MCA by authorization of a military judge “to substitute a summary for classified information”<sup>75</sup> or “to substitute a statement admitting relevant facts that the classified information or material would tend to prove.”<sup>76</sup>

Language in the 2006 MCA allowing the use of some coerced statements is especially problematic. Although under the 2006 MCA a “statement obtained by use of torture shall not be admissible,”<sup>77</sup> statements obtained by use of cruel, inhuman or degrading treatment or any other form of “coercion” prior to creation of the 2005 Detainee Treatment Act (“DTA”)<sup>78</sup> could have been admitted under the 2006 Act if the military judge found that they are “reliable and possess . . . sufficient probative value” and that the “interests of justice would best be served by admission of the statement into evidence.”<sup>79</sup> Statements obtained by “coercion” after enactment of the DTA that did not amount to “cruel, inhuman, or degrading treatment” prohibited by the DTA could be admitted.<sup>80</sup> Therefore, if the prohibition of other forms of coercion, intimidation, and improper treatment under the Geneva Conventions—such as the prohibitions of “humiliating” treatment, “mutilation,” “outrages upon personal dignity,” “physical suffering,” and “intimidation”<sup>81</sup>—did not have primacy over the 2006

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at A1; Darrel J. Vandeveld, *I Was Slow to Recognize the Stain of Guantanamo*, WASH. POST, Jan. 18, 2009. But see Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance*, 42 GEO. J. INT'L L. 303, 364-65 (2011).

73. 2009 MCA, *supra* note 11, sect. 1802, § 949p-4(a)(2).

74. 2006 MCA, *supra* note 11, sect. 3(a)(1), § 949j(c)(B)-(C). Similar provisions exist in § 949d(f)(2)(A)(ii)-(iii).

75. 2009 MCA, *supra* note 11, sect. 1802, § 949p-4(b)(1)(B).

76. *Id.*, sect. 1802, § 949p-4(b)(1)(C).

77. 2006 MCA, *supra* note 11, sect. 3(a)(1), § 948r(b). But see David J.R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohamed Jawad*, 22 HARV. HUM. RTS. J. 1, 21-22 (2009); Gregory S. McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DE PAUL L. REV. 943 (2010).

78. Department of Defense Appropriations Act, 2006, tit. X, § 1003(d), Pub L. No. 109-148, 119 Stat. 2680 (2005). Title X of the Act is commonly referred to as the Detainee Treatment Act of 2005.

79. See 2006 MCA, *supra* note 11, sect. 3(a)(1), § 948r(c)(1)-(2); see also *id.*, sect. 3(a)(1), § 949a(b)(2)(C) (“A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r.”); Frakt, *supra* note 72, at 1390-1401 (regarding coerced statements and the military commissions at Guantanamo); The Attorney General of Canada on Behalf of The United States of America v. Abdullah Khadr, 2011 ONCA 358 (May 6, 2011) (dealing with the Canadian Court of Appeal for Ontario refusal to extradite Khadr to the U.S. because extraditing him would be tantamount to ignoring his prior torture at the behest of the United States.).

80. 2006 MCA, *supra* note 11, sect. 3(a)(1), § 948r(d)(1)-(3).

81. See, e.g., GC, *supra* note 4, art. 3(1) (stating that detainees must be “treated humanely”); *id.* art. 3(1)(a) (stating that no “mutilation” is allowed); *id.* art. 3(1)(c) (stating that no “outrages upon personal dignity” are allowed and no “humiliating” treat-

MCA,<sup>82</sup> violations of the laws of war and human rights law would occur with respect to use of such coerced information.<sup>83</sup> Of additional relevance is the recognition in *In re Guantanamo Detainee Cases*<sup>84</sup> that “[t]he

ment is allowed); *id.* art. 27 (indicating that persons must be “humanely treated”); *id.* art. 31 (“[n]o physical or moral coercion shall be exercised . . . in particular to obtain information”); *id.* art. 32 (stating that no “physical suffering” is allowed); *id.* art. 33 (“all measures of intimidation or of terrorism are prohibited”); *id.* art. 147 (indicating that “great suffering or serious injury” are “grave” breaches); see also ICCPR, *supra* note 5, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment.”). Concerning the absolute prohibition of torture and cruel, inhuman, or degrading treatment, see Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1535-37 (2009).

82. They do prevail under the *Cook* rule, the “rights under” treaties exception to the last-in-time rule, and the law-of-war exception to the last-in-time rule. For an elaboration on this, see *supra* notes 64, 28, and 29, respectively.

83. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”); ICCPR, *supra* note 5, art. 14(3)(g) (“everyone shall be entitled . . . [n]ot to be compelled . . . to confess guilt”); American Convention on Human Rights, *supra* note 20, art. 8(2)(g) (“the right not to be compelled to be a witness against himself or to plead guilty”); *id.* art. 8(3) (“A confession of guilt . . . shall be valid only if it is made without coercion of any kind”); Geneva Protocol I, *supra* note 13, art. 75(4)(f) (“No one shall be compelled . . . to confess guilt.”); G.A. Res. 61/153, ¶ 7, U.N. Doc. A/RES/61/153 (Feb. 14, 2007) (stating that while responding to terrorism, states should “ensure that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”); G.A. Res. 60/148, ¶ 6, U.N. Doc. A/RES/60/148 (Dec. 16, 2005); U.N. Comm. Against Torture, *G.K. v. Switzerland*, Communication No. 219/2002, ¶ 6.10, U.N. Doc. CAT/C/30/D/219/2002 (May 7, 2003) (noting the “broad scope of the prohibition” of use of any statement resulting from torture); U.N. Comm. Against Torture, *P.E. v. France*, Communication No. 193/2001, ¶ 3.5.4, U.N. Doc. CAT/C/29/D/193/2001 (Dec. 19, 2002); U.N. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Georgia*, ¶ 26, U.N. Doc. CCPR/C/79/Add.75 (May 5, 1997) (“Confessions obtained under duress should be systematically excluded from judicial proceedings.”); U.N. Hum. Rts. Comm., *General Comment No. 20*, ¶ 12, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Bodies*, 31, U.N. Doc. HRI/GEN/1 (Sept. 4, 1992) (“[T]he law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment” under Article 7 of the ICCPR.); U.N. Hum. Rts. Comm., *General Comment No. 13*, ¶ 14, U.N. Doc. CCPR/C/21/Add.3 (Apr. 13, 1984) (“evidence provided by means of such methods [that violate Article 7 of the ICCPR] or any other form of compulsion is wholly unacceptable”); Paust, *Military Commissions*, *supra* note 4, at 15; see also *United States v. Altstoetter*, *supra* note 21, at 1093-94 (addressing the war crime responsibility of defendant Klemm: “[I]t can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo . . . was placed beyond the jurisdiction of law. He must have been aware that a prolific source of clear cases based on confessions and, therefore, legally incontestable, came to him from the obscurity of the torture chamber . . . . More specifically, Klemm knew of abuses in concentration camps. He knew of the practice of severe interrogations . . . . While he was in the Party Chancellery he wrote the letter . . . denying the application of the German . . . law to Poles, Jews, and gypsies.”).

84. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment."<sup>85</sup> Therefore, under international law and constitutionally-based due process standards, such statements must be excluded.

Under the 2009 MCA, "[a] statement of the accused that is otherwise admissible shall not be excluded . . . on the grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r,"<sup>86</sup> which contains language that "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)) . . . shall be admissible."<sup>87</sup> The problem is that what is covered as cruel, inhuman, or degrading treatment in the DTA does not fully reflect customary and treaty-based international law and is far too limiting.<sup>88</sup> Moreover, it may be that one is compelled to testify or to admit guilt without having suffered such unlawful treatment. It is important, therefore, that international law must prevail over the DTA to the extent that the DTA is inconsistent,<sup>89</sup> and that all forms of cruel, inhuman, and degrading treatment be covered.

The right to counsel of one's choice and to adequate representation is also jeopardized under the Military Commission Act. Under the Act, civilian defense counsel is limited to U.S. citizens with access to classified information at the level of secret or higher.<sup>90</sup> Civilian defense counsel cannot divulge any classified information to their client or to any other person not entitled to receive such information.<sup>91</sup>

Although appeal before a Court of Military Commission Review and the Circuit Court for the District of Columbia is limited in each instance to "matters of law,"<sup>92</sup> the legal problems concerning creation of an indepen-

85. *Id.* at 472 (citing *Jackson v. Denno*, 378 U.S. 368, 386 (1964)).

86. 2009 MCA, *supra* note 11, sect. 1802, § 949a(b)(3)(B). *But see* ICCPR, *supra* note 5, arts. 7, 14(3)(g) ("right [n]ot to be compelled to testify against himself or to confess guilt"); American Convention on Human Rights, *supra* note 20, art. 8(2)(g).

87. 2009 MCA, *supra* note 11, sect. 1802, § 948r(a).

88. *See* Paust, *Above the Law*, *supra* note 27, at 377-79.

89. *See id.* at 379-80.

90. 2009 MCA, *supra* note 11, sect. 1802, § 949c(b)(3)(A) & (D); 2006 MCA, *supra* note 11, § 949c(b)(3). *But see* ICCPR, *supra* note 5, art. 14(3)(b) ("counsel of his choosing"); *id.* art. 14(3)(d) ("legal assistance of his choosing"); American Convention on Human Rights, *supra* note 20, art. 8(2)(d)-(e); Paust, *Military Commissions*, *supra* note 4, at 14.

91. 2009 MCA, *supra* note 11, sect. 1802, §§ 949c(b)(7) & 949p-1(a); 2006 MCA, *supra* note 11, sect. 3(a)(1), § 949c(b)(4). *But see* 2009 MCA, *supra* note 11, sect. 1802, § 949p-1(b) ("Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge shall be provided to the accused."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 614 (2006); Paust, *Military Commissions*, *supra* note 4, at 11.

92. *See* 2009 MCA, *supra* note 11, sect. 1802, § 950d(g), 950g(d) (stating that the D.C. Circuit "shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict"); 2006 MCA, *supra* note 11, sect. 3(a)(1), § 950f(d) (indicating the scope of review of the CMCR); *id.* § 950g(b) (indicating the scope of review of the D.C. Circuit). Under the 2006 MCA, review by the D.C. Circuit had been limited to "(1) whether the final decision was consistent with the standards and procedures specified in [the Act]; and (2) to the extent applicable, the Constitution

dent and regularly constituted tribunal, the status and equality of treatment of accused, fair procedures and fair rules of evidence, and coerced statements noted above are matters of law and should be fully addressed. With respect to the fundamental right of convicted persons to a review of their conviction by a competent, independent, and impartial court,<sup>93</sup> what is clearly problematic is the statement in the 2009 MCA that “[a] finding or sentence of a military commission . . . may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.”<sup>94</sup> Under human rights law, however, all errors of law should be reviewable.

In view of the fact that review is possible with respect to applicable matters of law, it is important to note that treaties of the United States and customary international law are relevant law and are part of the constitutionally-based “laws of the United States.”<sup>95</sup> They are also a necessary background for interpretation of federal statutes.<sup>96</sup> For these reasons, it will only be possible to provide meaningful appellate review in the District of Columbia Circuit if all relevant international legal standards and the recognitions by the Supreme Court in *Hamdan* with respect to minimum due process guarantees under international law are followed.

#### IV. Shocking Errors and Deviant Dicta in the District of Columbia Circuit

Rarely has a circuit court judge been defiant of well-known Supreme Court precedent and the rule of law. Unfortunately, this sort of defiance is evident in an opinion addressing claims arising out of Guantanamo with respect to habeas review of the propriety of detention as well as in two

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and the laws of the United States.” 2006 MCA, *supra* note 11, § 950g(c)(1)–(2). Since some of the standards and procedures set forth in the 2006 Act either violate international law or are highly problematic, limitation of review to whether a final decision was consistent with some of the standards and procedures expressed in the 2006 Act would hardly be sufficient to comply with international legal standards concerning the creation of a regularly constituted tribunal, the status and equality of treatment of persons subject to trial, procedural fairness, effective representation by counsel of one’s choice, and meaningful review by a court of law.

93. See ICCPR, *supra* note 5, art. 14(1); *id.* art. 14(5) (“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”); American Convention on Human Rights, *supra* note 20, art. 8(2)(h) (declaring “the right to appeal the judgment to a higher court”).

94. 2009 MCA, *supra* note 11, sect. 1802, § 950a(a).

95. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”); *Henfield’s Case*, 11 F. Cas. 1099, 1100–02 (C.C.D. Pa. 1793) (Jay, C.J.) (stating that judicial power encompasses customary international law directly as “laws of the United States”); PAUST, LAW OF THE UNITED STATES, *supra* note 28, at 7–11, 67–80; PAUST, VAN DYKE & MALONE, *supra* note 46, at 123–47; RESTATEMENT, *supra* note 60, § 111; Paust, *In Their Own Words*, *supra* note 26, at 231–40; see also THE FEDERALIST NO. 80, at 589 (Alexander Hamilton) (John C. Hamilton ed., 1868) (recognizing that under the Constitution “cases arising upon . . . the law of nations” will be “proper” before the federal judiciary). See generally *supra* note 25.

96. See RESTATEMENT, *supra* note 60, § 114, cmt. a, note 1; *infra* notes 100–102 and accompanying text.

subsequent opinions concerning the denial of a rehearing *en banc* in the same case. As noted in another article, surprising misinformation appears in imprudent dicta in a 2010 circuit court opinion that is manifestly erroneous and unavoidably contrary to venerable Supreme Court law.<sup>97</sup> In *Al-Bihani v. Obama*,<sup>98</sup> Judge Janice Brown, writing for the majority, offered dicta that is loaded with a number of errors. As she opined,

[T]he premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war . . . is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005, . . . or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts. . . . Even assuming Congress had at some earlier point implemented the laws of war as domestic law through appropriate legislation, Congress had the power to authorize the President in the AUMF and other later statutes to exceed those bounds. . . . Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, . . . their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers.<sup>99</sup>

The first error that Judge Brown committed was to ignore the well-known and controlling Supreme Court precedent that has been followed since the early days of the Constitution with respect to interpretation of Acts of Congress when international law is at stake. This precedent, known as the *Charming Betsy* rule, holds that "an Act of Congress ought never to be construed to violate the law of nations if any other possible

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97. See Jordan J. Paust, *Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward*, 19 TULANE J. INT'L & COMP. L. 151, 166-70 (2010). This and the next three paragraphs are borrowed from the article and are partly supplemented herein.

98. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

99. *Id.* at 871. But see *id.* at 885 (Williams, J., concurring in part) (criticizing the unnecessary dicta as "divorced from application of any particular argument" that is "hard to square" with the views of Justice O'Connor's and Justice Souter's in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and going beyond the government's own argument in *Al-Bihani* that "[t]he authority conferred by the AUMF is informed by the laws of war" (quoting Brief for Appellees at 23, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051))). The government's argument is correct in view of the fact that international law is a necessary background for the purpose of interpreting federal statutes. See *supra* note 96. This is what Justice O'Connor did in *Hamdi* when using the law of war as an interpretive aid and quoting one of my articles to affirm the existence of presidential power to detain certain persons without trial. See *Hamdi*, 542 U.S. at 520-21 (2004). That is also what the government did in its brief with extensive analysis of relevant laws of war. See Brief for Appellees, *supra*, at 16, 18, 21, 23-25, 32-50. In fact, the government argued that "[t]he President has authority under the AUMF, as informed by the laws of war, to detain any individual who was part of al-Qaida or Taliban forces, the principal organizations that fall within the AUMF's authorization of force." *Id.* at 25. Also, see *infra* note 102 for related recognitions by the government in this case. There was simply no support for Judge Brown's dicta. Judge Brown's dicta offered no citation to a court opinion other than that in *Hamdi*. The dicta has already misled a district court. See *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 115 n.8 (D.D.C. 2010).

construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations.”<sup>100</sup> Importantly, Chief Justice Marshall’s famous ruling in *Charming Betsy* occurred during time of war and was a law of war ruling that also expressed the fundamental rule regarding the primacy of rights when he declared that federal statutes “can never be construed to violate” rights under international law.<sup>101</sup> Additionally, as the Supreme Court has long recognized, federal statutes must be interpreted consistently with international law (not the other way around) and international law is a necessary background for interpretive purposes, whether or not the federal statute at first appears to be unambiguous.<sup>102</sup> Contrary to Judge Brown’s claim,

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100. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 117–18 (1804) (Marshall, C.J.).

101. *Id.* at 117–18 (emphasis added). *Charming Betsy* had actually involved the improper seizure by a “commander of a United States ship of war,” and was decided with reference to the controlling “laws of war;” counsel declaring during argument that “[a]s far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply” and referred to capture as an “incident of war,” to “[t]he law of nations in war,” and to the fact that “Captain Murray’s authority . . . was derived not only from our municipal law, and his instructions, but from the law of nations.” *Id.* at 64, 77, 79–80.

102. See, e.g., *id.* There were other early recognitions of this fundamental rule of statutory construction favoring international law. See *Talbot v. Seeman*, 5 U.S. 1, 43–44 (1801); *Ross v. Rittenhouse*, 2 U.S. 160, 162 (1792); *The Resolution*, 2 U.S. 1, 4 (1781); *Rutgers v. Waddington*, Mayor’s Court of the City of New York (1784), in 2 AMERICAN LEGAL RECORDS, SELECT CASES OF THE MAYOR’S COURT OF NEW YORK CITY 1674–1784, at 325 (Richard B. Morris ed., 1935) (construing the 1783 N.Y. Trespass Act consistently with the Treaty of Peace); 1 Op. Att’y Gen. 26, 27 (1792); PAUST, VAN DYKE & MALONE, *supra* note 46, at 153; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 457–58 (1969).

The *Charming Betsy* rule has extensive subsequent recognition. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896, 2929 n.40 (2010) (Ginsburg, J.); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 143–44 (2005) (Ginsburg, J., concurring); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (Stevens, J.); *Id.* at 207 (Blackmun, J., dissenting); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (adding that the rule is wholly independent “of the presumption against extraterritoriality” and “is relevant to determining the substantive reach of the statute” in view of limitations under “customary international law”); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (“congressional expression [to override is] necessary”); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963); *Lauritzen v. Larsen*, 354 U.S. 571, 577–78 (1953); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *United States v. Flores*, 289 U.S. 137, 159 (1933) (“it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in light of recognized principles of international law”) (emphasis added); *Cook v. United States*, 288 U.S. 102, 120 (1933) (the purpose to override must be “clearly expressed”); *United States v. Payne*, 264 U.S. 446, 448 (1924); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902) (the “purpose . . . [to override] must appear clearly and distinctly from the words used” by Congress); *Chew Heong v. United States*, 112 U.S. 536, 539–40, 549–50 (1884); *United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496 (1883) (“[t]he laws of Congress are always to be construed so as to conform to the provisions of a treaty”); *The Pizarro*, 15 U.S. 227, 245–46 (1817); *The Ship Rose*, 36 Ct. Cl. 290, 301 (1901); *The Schooner Nancy*, 27 Ct. Cl. 99, 109 (1892); 11 Op. Att’y Gen. 297, 299–300 (1865); 9 Op. Att’y Gen. 356, 362–63 (1859); PAUST, VAN DYKE &



Congress used the word “appropriate” in the AUMF as an express and unavoidable textual limitation that clearly conditions what forms of conduct the President can authorize. Under long-standing Supreme Court case law, it is obvious that the word “appropriate” must be interpreted consistently with relevant international law, such as the customary and treaty-based laws of war.<sup>103</sup>

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MALONE, *supra* note 46, at 154, 553–54, 662; RESTATEMENT, *supra* note 60, § 114; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (“our understanding [of the AUMF] is based on longstanding law-of-war principles”); *id.* at 551 (Souter, J., dissenting in part and concurring in judgment) (using the law of war and stating: that “[T]here is reason to question whether the United States is acting in accordance with the laws of war . . . I conclude accordingly that the Government has failed to support the position that the” AUMF “authorizes the described detention.”). *But see* Sampson v. Fed. Repub. of Ger., 250 F.3d 1145, 1152–53 (7th Cir. 2001) (Alleging, without support, that *Charming Betsy* “has traditionally justified a narrow interpretation of [merely] ambiguous legislation to avoid violations of international law” and “directs courts to construe ambiguous statutes to avoid conflict with international law”—also erroneously considering an alleged effect of *Erie*. *But see infra* note 115.); Mississippi Poultry Ass’n, Inc. v. Madigan, 992 F.2d 1359, 1367 (5th Cir. 1993) (stating that the circuit panel was “loath . . . to extend [the *Charming Betsy* rule] to multi-lateral trade agreements”); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (alleging, without support, that there is a duty of courts merely to enforce statutes, “not to conform” them “to norms of customary international law”).

103. *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (citing long-standing customary international laws of war that detention of enemy combatants can last no longer than the duration of active hostilities to hold that the AUMF’s authorization to use “all necessary and appropriate force,” limits their detention to the end of active hostilities against Taliban fighters in Afghanistan); *id.* at 551 (Souter, J., dissenting in part and concurring in part); Al-Bihani v. Obama, 619 F.3d 1, 54 (D.C. Cir. 2010) (“it seems improbable that in authorizing the use of all ‘necessary and appropriate force’ Congress could have contemplated employment of methods clearly and unequivocally condemned by international law”); *id.* at 55 n.1 (“The Obama administration’s interpretation of the AUMF is that international law does illuminate the outer bounds of the authority conferred by the Statute.”); Hatim v. Obama, 677 F. Supp. 2d 1, 7 (D.D.C. 2009) (“limits of the AUMF and the law of war”); Anam v. Obama, 653 F. Supp. 2d 62, 64 (D.D.C. 2009); Mattan v. Obama, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (noting that the government’s claim is that the AUMF “is necessarily informed by principles of the laws of war”); Hamlily v. Obama, 606 F. Supp. 2d at 69–70; Basardh v. Obama, 612 F. Supp. 2d 30, 34 (D.D.C. 2009); Brief for Appellees, Al-Bihani v. Obama, *supra* note 99, at 23 (“the AUMF is informed by the laws of war”); *id.* at 25 (“as informed by the laws of war”); *id.* at 49 (“the *Hamdi* plurality made clear that the detention of individuals fighting . . . [is] ‘so fundamental and accepted [as] an incident of war as to be an exercise’ of the ‘necessary and appropriate’ force authorized by the AUMF” and that “[t]he AUMF ‘includes the authority to detain for the duration of the relevant conflict and . . . is based on longstanding law-of-war principles,’” quoting *Hamdi*, 542 U.S. at 518, 521); *id.* at 50 (quoting Paust, *Judicial Power*, *supra* note 40, at 510–11, and noting that the article was “quoted in *Hamdi*” for this purpose); *id.* at 52–53; JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR 92 (2007) [hereinafter PAUST, BEYOND THE LAW]; Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (stating that the Obama Administration is “resting our detention authority on a domestic statute—the 2001 Authorization for Use of Military Force (AUMF)—as informed by the principles of the laws of war” and “as a matter of international law, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases,

A second, otherwise well-known rule based in Supreme Court case law that Judge Brown seemingly ignored is the *Cook* rule. Under the *Cook* rule, if, after attempting to construe a federal statute consistently with an earlier treaty, there still appears to be a clash, an unavoidable clash with a subsequent federal statute that might allow application of the last in time rule will not even arise unless there is a clear and unequivocal expression of congressional intent to override a particular treaty in the statute.<sup>104</sup> If not, the prior treaty has primacy in our domestic legal process. As noted in another writing, it is obvious that there was no clear and unequivocal expression of congressional intent to override any relevant treaty in either

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we have interpreted the scope of detention authority authorized by Congress in the AUMF as informed by the laws of war.”) (emphasis in original); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984) (indicating that, more generally, courts are not bound to respect power “delegated by Congress to the Executive Branch” if the Executive Branch exercises such power “in a manner inconsistent with . . . international law”); *MacLeod v. United States*, 229 U.S. 416, 434 (1913) (“The statute should be construed in light of the purpose of the Government to act within the limitation of the principles of international law, . . . and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law.”); *Miller v. United States*, 78 U.S. 268, 314–16 (1870) (Field, J., dissenting) (noting that “legislation founded [on] the war powers” is subject to “limitations . . . imposed by the law of nations” and “[t]he power to prosecute . . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules . . . is . . . subject to the condition that they are within the law of nations. There is a limit . . . imposed by the law of nations, and [it] is no less binding upon Congress than if the limitation were written in the Constitution.”); *The Sally*, 12 U.S. 382, 384 (1814) (Story, J.) (holding that conduct under an act of Congress “was absorbed in the more general operation of the law of war” and was permissible under the law of nations); *Brown v. United States*, 12 U.S. 110, 149, 153 (1814) (Story, J., dissenting) (affirming that even when Congress provides the Executive a broad and seemingly unlimited authorization to carry war into effect, “he cannot lawfully transcend the rules of warfare . . . . He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims.”); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801) (Marshall, C.J.) (holding that even when Congress authorizes “general hostilities, . . . the general laws of war apply”); *Bas v. Tingy*, 4 U.S. 37, 43 (1800) (Chase, J.) (holding that even if Congress declares a general war, “its extent and operations are . . . restricted and regulated by the *jus belli*, forming a part of the law of nations”); 9 Op. Att’y Gen. 356, 357 (1859) (what the President “will do must of course depend upon the law of our own country, as controlled and modified by the law of nations”). But see *Al-Bihani v. Obama*, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (arguing that *Charming Betsy* does not apply “when interpreting a statute like the AUMF that broadly authorizes the President to wage war”); *supra* note 102.

Judge Kavanaugh even seeks to overrule the *Charming Betsy* and *Cook* rules and their supporting cases with a completely made up “default presumption” that would flip *Charming Betsy* and ignore the *Cook* rule when Congress does not expressly refer to international law. *Al-Bihani*, 619 F.3d at 31–32; see also *supra* note 64. This he cannot do. Moreover, four points are certain: (1) Congress set an express limitation by use of the word “appropriate,” (2) the Supreme Court has long recognized that Congress has authority to limit presidential war-making in terms of place, methods and the manner, operations, objects, persons and things affected, and time; (3) an overwhelming number of cases and opinions have recognized that the President is bound by the laws of war; and (4) application of the Supreme Court’s *Charming Betsy* rule requires recognition that the word “appropriate” includes law of war limitations. See, e.g., Paust, *Above the Law*, *supra* note 27, at 382–88; *infra* notes 110, 115.

104. See *supra* note 64.

the AUMF or the 2005 DTA.<sup>105</sup> Therefore, under venerable Supreme Court case law, all relevant treaties necessarily have primacy over each of these forms of legislation.

With respect to the 2006 and 2009 MCAs, it is noted above that there was merely an intent to limit certain rights under the Geneva Conventions, and there was no clear and unequivocal expression of congressional intent to override any other relevant treaty or customary international law.<sup>106</sup> Provisions of the MCA that are inconsistent with the Geneva Conventions still will not prevail in any event. Even if a statute is unavoidably inconsistent with a prior treaty and Congress has expressed a clear and unequivocal intent to override the treaty in the statute such that the last in time rule might apply, portions of the treaty may still control under exceptions documented in Supreme Court and other federal court decisions.<sup>107</sup> As noted above, one of these exceptions assures the primacy of "rights under" treaties.<sup>108</sup> The other exception assures the primacy of the laws of war,<sup>109</sup> of which the Geneva Conventions are a part. Contrary to Judge Brown's unsupportable *dicta*, even if one could ignore the Supreme Court's *Charming Betsy* and *Cook* rules, under either of these exceptions to the last in time rule, Congress could not rightly authorize the President to violate rights under treaties or the laws of war. Therefore, rights under the Geneva Conventions as treaties and laws of war must prevail.

Furthermore, it is well-known from an overwhelming number of cases and other patterns of legal expectation since the beginning of the United States that treaty-based and customary laws of war are binding on the President and the entire Executive branch. Therefore, they have controlling legal force, must be faithfully executed, and necessarily limit the President's war powers.<sup>110</sup> The Founders, Framers, and early judicial opinions

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105. See, e.g., PAUST, *BEYOND THE LAW*, *supra* note 103, at 44-45, 91-98; Paust, *Above the Law*, *supra* note 27, at 377-80, 400-06, 412-15.

106. See *supra* notes 21-23 and their accompanying text.

107. Concerning the five-step process for resolving a potential clash between a treaty and a subsequent federal statute, including the exceptions to the last-in-time rule documented in Supreme Court cases, see PAUST, *LAW OF THE UNITED STATES*, *supra* note 28, at 99-108, 120-21; PAUST, VAN DYKE & MALONE, *supra* note 46, at 153-54, 532-48.

108. See *supra* note 28.

109. See *supra* note 29.

110. See *Dooley v. United States*, 182 U.S. 222, 231 (1901) (holding that executive military powers during war-time occupation are "regulated and limited . . . directly from the laws of war . . . from the law of nations"); *United States v. The Paquette Habana*, 175 U.S. 677, 698, 700, 708, 711, 714 (1900) (using the "law of war" expressly); *New Orleans v. The Steamship Co.*, 87 U.S. 387, 394 (1874) (stating that limits exist "in the laws and usages of war"); *Miller v. United States*, 78 U.S. 268, 314-16 (1870) (Field, J., dissenting); *The Venice*, 69 U.S. 258, 279 (1864) (holding that the seizure of a vessel as prize of war by a U.S. ship of war violated the laws of war); *The Prize Cases*, 67 U.S. 635, 666-68, 671 (1863) (indicating that the President "is bound to take care that the laws be faithfully executed," including in context the "laws of war," "*jure belli*" and the right of "capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations"); *United States v. Guillem*, 52 U.S. 47 (1850) (holding that a neutral crew could not be made prisoners of war or have its property confiscated by the Executive even if they were on an enemy vessel during a blockade); *Brown v. United States*, 12 U.S. 110, 149, 153 (1814) (Story, J., dissenting); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801) (Marshall,

C.J.); *Bas v. Tingy*, 4 U.S. 37, 43 (1800) (Chase, J.) (stating that war's "extent and operations are . . . restricted by the *jus belli*, forming part of the law of nations"); *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005); 11 Op. Att'y Gen. 297, 299-300 (1865); Paust, *In Their Own Words*, *supra* note 26, at 240-45; *see also* *United States v. Macintosh*, 283 U.S. 605, 622 (1931); *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 318 (1936) ("operations of the nation in . . . [foreign] territory must be governed by treaties . . . [as well as] the principles of international law"); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Herrera v. United States*, 222 U.S. 558, 573 (1912) (quoting *Planters' Bank v. Union Bank*, 83 U.S. 483, 495 (1873)) ("it was there decided that the military commander at New Orleans 'had power to do all that the laws of war permitted,'" *Herrera* adding, "if it was done in violation of the laws of war . . . it was done in wrong"); *Mitchell v. Harmony*, 54 U.S. 115, 137 (1852) (noting that illegal orders provide no defense); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 77, 79-80, 117-18, 126 (1804); *Ex parte Duncan*, 153 F.2d 943, 956 (9th Cir. 1946) (Stephens, J., dissenting) (recognizing that an occupation commander's "will is law subject only to the application of the laws of war"); *United States v. American Gold Coin*, 24 F. Cas. 780, 782 (C.C.D. Mo. 1868) (stating that when it became necessary for the national government to take every possible measure against an enemy, measures taken must also be "consistent with the laws of war"); *Elgee's Adm'r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (Miller, J.) (concerning the "law of nations, . . . no proclamation of the president can change or modify this law"); *Johnson v. Twenty-One Bales*, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (holding that courts cannot construe executive orders so as to abrogate a right under the law of war); *Dias v. The Revenge*, 7 F. Cas. 637, 639 (C.C.D. Pa. 1814) (Washington, J.) (concerning improper conduct under the laws of war, the owner of a privateer cannot "shield himself, by saying that the privateer . . . acts under the president's instructions"); 8 Op. Att'y Gen. 365 (1857) ("The commander of the invading, occupying, or conquering army, rules . . . with supreme power, limited only by international law, and the orders of the sovereign or government."); *Bell v. Louisville & N.R. Co.*, 1 Bush 404, 1867 WL 3920 (Ky. App. 1866) (quoting HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* (6th ed. 1855) (stating that the "obligation [of belligerents] to observe the common laws of war towards each other is . . . absolute, indispensably binding on both parties")); *State ex rel. Tod v. Fairfield County, Court of Common Pleas*, 15 Ohio St. 377, 389-91 (1864) ("There is no limitation placed upon this grant of the power to carry on war, except those contained in the laws of war . . . . If a party brings a suit against the president, or any one of his subordinates . . . do not questions at once arise, of the extent and lawfulness of the power exercised, and of the right to shield the subaltern acting under orders, and hold his superior alone responsible? And are not these constitutional questions? If so, then, the case is one 'arising under the constitution' [for federal courts] . . . . The controversy is merely as to the occasions and manner of its exercise, and as to the parties who should be held responsible for its abuse. In time of war . . . [a military commander] possesses and exercises such powers, not in spite of the constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto . . . . And in time of war, without any special legislation, not the commander-in-chief only, but every commander . . . is lawfully empowered by the constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war . . . . The president is responsible for the abuse of this power. He is responsible civilly and criminally."); *In re Kemp*, 16 Wis. 359, 392 (1863) ("His duty is still only to execute the laws, by the modes which the laws themselves prescribe; to wage the war by employing the military power according to the laws of war."); *id.* at 395 ("Within those limits let the war power rage, controlled by nothing but the laws of war."); *Ward v. Broadwell*, 1 N.M. 75, 79 (1854) (quoting President Polk: "The power to declare war against a foreign country, and to prosecute it according to the laws of war, . . . exists under our constitution. When congress has declared that war exists with a foreign nation, the laws of war apply . . . and it becomes the duty of the president . . . to prosecute it"; citing Message of the President of July 24, 1848, Exec. Doc. No. 70); Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 *THE PAPERS OF ALEXANDER HAMILTON* 43 (Harold C. Syrett ed., 1969) (stating that during war, "it belongs to

also uniformly affirmed that Congress is bound by the customary laws of war and cannot authorize their infraction.<sup>111</sup> It is also clear that they understood that the people are bound by international law and possessed no power to violate international law or to delegate such a power to any branch of the federal government.<sup>112</sup>

Moreover, contrary to unsupported dicta in Judge Brown's opinion,<sup>113</sup> it is clear that, since 1916, Congress has incorporated all of the laws of war as offenses against the laws of the United States<sup>114</sup> and that, in any event, as the Supreme Court famously affirmed, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including

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the 'Executive Power,' to do whatever else the laws of Nations . . . enjoin"); James Madison, *Letters of Helvidius*, No. II, reprinted in 4 WRITINGS OF JAMES MADISON 159 (Gailard Hunt ed., 1906) ("The executive is bound faithfully to execute the laws of neutrality . . . . It is bound to the faithful execution of these as of all other laws, internal and external, by the nature of its trust and the sanction of its oath."); John Jay, Draft Charge to the Grand Jury of the Circuit Court for the District of Virginia (1793), reprinted in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 359, 361 (Maeva Marcus ed., 1988) ("By the Laws of Nations our Conduct . . . is to be regulated both in peace and in war."); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 534 & nn.406, 408 (2007) (quoting remarks of Representatives Philip Barbour and Alexander Smyth of Virginia in 1819 that presidential actions are regulated by the "laws of war" and "law of nations or treaties"); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURVEY AM. L. 497, 511-17 (2007) (addressing "treaty-based constraints on executive action in wartime" applied over a presidential order in *United States v. The Schooner Peggy*, 5 U.S. 103 (1801), and in *United States v. Lavery*, 26 F. Cas. 875 (D. La. 1812)); see also *infra* notes 115-117. The constitutional basis for the President's unavoidable duty to faithfully execute the laws of war is Article II, Section 3 of the U.S. Constitution. See also Paust, *In Their Own Words*, *supra* note 26, at 243-44 (discussing the affirmations of Hamilton, Wirt, and Madison); *supra* notes 25, 95; *infra* notes 116-117.

111. See Paust, *In Their Own Words*, *supra* note 26, at 217-30; *supra* notes 25, 102 and accompanying text.

112. See Paust, *In Their Own Words*, *supra* note 26, at 208-16. Unanimous views of the Founders, Framers, and early judiciary as well as the text and structure of the Constitution demonstrate that there was in fact no delegation to the Executive of a power to violate international law. See *id.*; PAUST, *LAW OF THE UNITED STATES*, *supra* note 28, at 8-9, 169-71, 180 n.2.

113. See *supra* note 99 and accompanying text.

114. See *In re Yamashita*, 327 U.S. 1, 7-8 (1946); *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942); *United States v. Schultz*, 4 C.M.R. 104, 111 (U.S.C.M.R. 1952); PAUST, ET AL., *supra* note 37, at 242-43, 251. Today, prosecution of violations of the laws of war is possible in a United States district court under two sets of federal legislation. See *id.* at 242-49. But see Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137 (2011) (indicating that no funds appropriated by the Act can be used "to transfer or release" persons at Guantanamo "to or within the United States," thereby precluding use of funds to transfer such persons for trial in the United States but not precluding prosecution in a federal court that happens to convene in the U.S. compound at Guantanamo Bay, Cuba). Prior to 1916, prosecution of violations of the laws of war and certain other international crimes had occurred without a federal implementing statute, and this may still be possible today. See FM 27-10, *supra* note 4, para. 505(e) ("As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to statutes of the United States."); PAUST, VAN DYKE & MALONE, *supra* note 46, at 131-49; PAUST, ET AL., *supra* note 37, at 301-04.

that part of the law of nations which prescribes . . . the status, rights and duties of enemy" individuals.<sup>115</sup> Additionally, a long line of cases docu-

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115. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942). This correct and decidedly informative affirmation by the Supreme Court of its independent authority to recognize and apply the laws of war was clearly declared after *Erie R.R. Co. v. Thompkins*, 304 U.S. 64 (1938). *Erie* only addressed ordinary common law as such and had absolutely nothing to do with customary international law, which has always been part of the laws of the United States and is not mere common law. See Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 306-12, 317 (1999). Additionally, the radical claim of a few revisionist textwriters that *Erie* had obviated judicial use of customary international law was conclusively denounced by the Supreme Court. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); PAUST, VAN DYKE & MALONE, *supra* note 46, at 498; see also *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (applying "the received rule of the law of nations on this point"); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 815 (1993) ("the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction"); *id.* at 818 (Scalia, J., dissenting) ("the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence"); *United States v. Maine*, 475 U.S. 89, 93 & n.7 (1986) ("This Court has consistently followed principles of international law in fixing the coastline," citing five Supreme Court cases); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984); *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622-23, 632 (1983) (holding that a counterclaim "arises under international law" and that "the seizure of Citibank's assets . . . [by Cuba] violated international law"); *United States v. Alaska*, 422 U.S. 184, 196-97, 200 (1975); *United States v. Louisiana*, 394 U.S. 11, 35, 42-44, 69-74 (1969); *United States v. California*, 381 U.S. 139, 172 (1965); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *id.* at 428 ("It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact."); *id.* at 430 n.34 (stating that courts are not "foreclosed from considering questions of international law"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (applying a "well-established rule of international law"); *Guessefeldt v. McGarth*, 342 U.S. 308, 318 (1952) (addressing enemy status "at [both] common and international law"); *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (addressing a "rule of the common law and the law of nations" concerning lack of alien enemy access to courts that "continues to be the law"); *Skirotes v. Florida*, 313 U.S. 69, 72-73 (1941) ("International law . . . is the law of all States of the Union"); *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 318 (1936); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 822 F.2d 230, 234-35, 237 (2d Cir. 1987) (allowing counterclaims against Cuban national bank arising out of discrimination in violation of international law and establishing that compensation will be governed by international law standards); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) ("law of the United States includes international law"); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 951 n.159 (D.C. Cir. 1984) ("part of United States laws"); *Fiocconi v. Attorney General of the United States*, 462 F.2d 475, 479 n.7 (2d Cir. 1972); *Banco Nacional de Cuba v. Farr, Whitlock & Co.*, 383 F.2d 166, 177 (2d Cir. 1967) (finding that sugar expropriated by Cuba from a Cuban company violated international law); *District of Columbia v. International Distributing Corp.*, 331 F.2d 817, 820 n.4 (D.C. Cir. 1964) ("It has long been recognized that international law is part of the law of the United States"); *Crosby v. Pacific S.S. Lines*, 133 F.2d 470, 475 (9th Cir. 1943) ("It is clear . . . that the federal courts would have applied any rule of international law bearing on the point."); *Fayssound Ltd. v. Walter Fuller Aircraft Sales, Inc.*, 748 F. Supp. 1365, 1371-74 (E.D. Ark. 1990) (finding expropriation in violation of treaty-based and customary inter-

menting constitutionally-based judicial power and responsibility to identify, clarify, and apply the laws of war in cases otherwise properly before the courts, and to even second-guess executive decisions made in times of

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national law); *United States v. Kakwirakeron*, 730 F. Supp. 1200, 1202 (N.D.N.Y. 1990); *United States v. Buck*, 690 F. Supp. 1291, 1297, 1299-1301 (S.D.N.Y. 1988); *Ishtyaq v. Nelson*, 627 F. Supp. 13, 27 (E.D.N.Y. 1983) ("international law is a part of the laws of the United States that federal courts are bound to ascertain and apply in appropriate cases"); *United States v. Crews*, 605 F. Supp. 730, 734 n.1 (S.D. Fla. 1985) ("is incorporated into the law of the United States"); *Lareau v. Manson*, 507 F. Supp. 1177, 1188 n.9 (D. Conn. 1980) ("customary international law is part of the law of the United States"); *American International Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 524-25 (D.D.C. 1980) (finding that Iran's nationalization of insurance industry violated an FCN treaty and customary international law); *United States v. Melekh*, 190 F. Supp. 67, 85 (S.D.N.Y. 1960) ("bound to recognize and apply the Law of Nations"); *Evangelinos v. Andreavapor CAI. NAV., S.A.*, 188 F. Supp. 794, 796 (S.D.N.Y. 1960) ("federal courts are bound by international law"); PAUST, VAN DYKE & MALONE, *supra* note 46, at 579-81 (documenting numerous federal and state court cases that have recognized that customary international law is supreme law of the land and directly binding).

It is also informative that after the Supreme Court declared that there were no longer any "common law" crimes in *United States v. Hudson & Goodwin*, 11 U.S. 32, 32-33 (1812), the Supreme Court affirmed circuit court jurisdiction over a defendant for "infracting the law of nations" and, in the alternative, for violating a statute. *United States v. Ortega*, 24 U.S. 467 (1826). Justice Story also recognized the propriety of direct incorporation when declaring that "all offences within the admiralty jurisdiction are cognizable by the Circuit Court, and in the absence of positive [statutory] law are punishable by fine and imprisonment." *United States v. Coolidge*, 25 F. Cas. 619, 623 (C.C. Mass. 1815). In 1820, the Supreme Court also implied that no statute was needed for direct use of the customary law of nations. See *United States v. Smith*, 18 U.S. 153, 159 (1820) ("But supposing Congress were bound in all the cases . . . to define the offense"—impliedly recognizing that Congress need not exercise its power to define piracy under the law of nations in a statute); see also *Morris v. United States*, 161 F. 672, 675 (8th Cir. 1908) (regarding "the settled law," "[t]here are no crimes or offenses cognizable in the federal courts, outside of . . . international law or treaties, except such as are created and defined by acts of Congress"); 14 Op. Att'y Gen. 249 (1873) (stating that a conviction of law of war violations without a statute was proper); PAUST, VAN DYKE & MALONE, *supra* note 46, at 136-46 (citing other cases directly using customary international law for criminal sanctions).

In *Al-Bihani*, Judge Kavanaugh made two fundamental errors that are relevant here. First, he confused mere common law with international law and mistakenly claimed that *Erie* (which had nothing to do with international law) had "decided" that federal courts could not "ascertain and enforce" customary international law and that, in any event, this unauthentic read of *Erie* somehow could prevail over subsequent Supreme Court recognitions regarding the applicability and use of customary international law in cases such as *Ex parte Quirin*, *First National City Bank, New Jersey v. New York*, *Sabbatino*, *Shirotos*, *Sosa*, *Trans World Airlines*, and *United States v. Maine*, among others noted above. See *Al-Bihani v. Obama*, 619 F.3d 1, 54, 9-10, 17-18 (D.C. Cir. 2010) (Kavanaugh, J., concurring). Second, he embraced and basically relied merely on a radical ahistorical and ultimately anti-constitutional minority viewpoint while mistakenly declaring more generally that "[i]nternational-law norms that have not been incorporated into domestic U.S. law by the political branches are not judicially enforceable limits on the President's authority under the AUMF;" "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms;" "[i]nternational-law principles are not automatically part of domestic U.S. law enforceable in federal courts;" and "the President is not subject to judicially enforceable international-law limitations." *Id.* at 9-10, 23, 51. But see the numerous cases and materials cited above, *supra* notes 25, 95, and 110, and *infra* notes 116 and 117.

war, is also well-known.<sup>116</sup> More generally, it is widely known that customary international law is constitutionally-based law of the United States and has been used by the judiciary with or without an implementing statute since the creation of the U.S. Constitution.<sup>117</sup> Furthermore, a profu-

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116. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004) ("While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here" and "the military claim must subject itself to the judicial process" and "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."); Paust, *Judicial Power*, *supra* note 40, at 518-24; *infra* note 117. See generally RESTATEMENT, *supra* note 60, § 111 cmts. c-e. See also *supra* notes 28-29, 64, 112. While entirely oblivious to numerous cases to the contrary that can easily be found by using computer-assisted research, Judge Kavanaugh prefers a radical and dangerous view that "courts may not interfere with the President's exercise of war powers based on international-law norms that the political branches have not seen fit to enact into domestic U.S. law." *Al-Bihani*, 619 F.3d 1, 11 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (citing nothing). But see Paust, *Judicial Power*, *supra* note 40, at 518-24 (citing numerous cases); *supra* note 110. He also repeated the absolute nonsense proffered by two radical revisionist professors that "[t]he Supreme Court has never invalidated presidential action on the ground that the action violated the laws of war." *Al-Bihani*, 691 F.3d at 52 (Kavanaugh, J., concurring) (quoting Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2097 (2005)). But see *The Paquete Habana*, 189 U.S. 453, 464 (1903) (upholding its prior decision in 1900 regarding violations of the laws of war by the Executive); *The Paquete Habana*, 175 U.S. 677, 698, 700, 708, 711, 714 (1900); *The Venice*, 69 U.S. 258, 279 (1864) (discussing violation by U.S. ship of war); *United States v. Guillemin*, 52 U.S. 47 (1850); *Brown v. United States*, 12 U.S. 110, 149 (1814) (Story, J., dissenting) (disagreeing that enemy property was wrongly seized, but expressly affirming that the President is bound by the laws of war); *The Schooner Peggy*, 5 U.S. 103 (1801) (Marshall, C.J.) (holding that the prize of war captured on instructions of the President was initially lawful, but the Court and the Executive were bound by a later treaty during the war to void the capture); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801) (Marshall, C.J.) (holding that if Congress authorizes general hostilities, "the general laws of war apply," and if partial hostilities are authorized, applicable laws of war "must be noticed"); *Bas v. Tingy*, 4 U.S. 37, 43 (1800) (Chase, J.) (stating that a general war declared by Congress is still "restricted and regulated by the *jus belli*" regarding the war's "extent and operations"); Paust, *Judicial Power*, *supra* note 40, at 518-24; see also *supra* note 111. In *The Paquete Habana*, the Supreme Court famously ruled against Executive claims that the law of war had not been violated and found that Executive conduct violated the customary law of war in connection with the seizure and control of enemy aliens and vessels abroad in time of war. See *The Paquete Habana*, 175 U.S. 677 (1900); Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981 (1994); Paust, *Judicial Power*, *supra* note 40, at 518-19. Exercise of such constitutionally assigned judicial power can assure the operation of proper checks and balances in a democratic government subject to the rule of law. See *Hamdi*, 542 U.S. at 535-36; see also *supra* note 110; *infra* notes 117, 132.

117. See *Waite v. The Antelope*, 28 F. Cas. 1341, 1341 (D.S.C. 1807) (stating that U.S. courts "are bound, by the Constitution of the United States, to determine according to treaties and the law of nations, wherever they apply"); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (stating that international law is "constitutionally committed" to the judiciary, quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991); PAUST, LAW OF THE UNITED STATES, *supra* note 28, at 7-12; RESTATEMENT, *supra* note 60, § 111 cmts. c-e; Edwin D. Dickinson, *The Law of Nations as Part of the Law of the United States*, 101 U. PA. L. REV. 26, 46, 48, 55-56 (1952); Louis Henkin, *International Law as*



sion of judicial opinions since the dawn of the United States have used human rights as part of their decision making.<sup>118</sup> As Chief Justice Marshall affirmed in 1810, our judicial tribunals “are established . . . to decide on human rights.”<sup>119</sup>

While denying a petition for rehearing *en banc* in *Al-Bihani*, the majority of judges of the D.C. Circuit declined “to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel’s discussion of that question is not necessary to the disposition of the merits.”<sup>120</sup> Judge Brown, however, berated the Executive for not accepting her prior *dicta* and continuing its “eager concession that international law does in fact limit the AUMF.”<sup>121</sup> Of course, contrary to her injudicious rant against the use of binding laws of war, the Executive’s position was guided by the Supreme Court’s decision in *Hamdi* and was markedly correct.<sup>122</sup>

While still ignoring relevant Supreme Court decisions, Judge Brown apparently considered that the *Charming Betsy* rule is a mere “scholarly . . . intuition that domestic statutes do not stand on their own authority, but rather rest against the backdrop of international norms,”<sup>123</sup> and that

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*Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984); Paust, *In Their Own Words*, *supra* note 26, at 231–39, 244; Paust, *Judicial Power*, *supra* note 40, at 514 n.37, 517–20; Memorandum for the United States as Amicus Curiae, *supra* note 51, at 21 (stating that in “the United States where international law is part of the law of the land, an individual’s fundamental human rights are in certain situations directly enforceable in domestic courts”); Hamilton, *Pacificus No. 1*, *supra* note 110, at 33, 35, 38, 40, 43 (“The Executive is charged with the execution of all laws, [‘duty to enforce the laws’ including] the laws of nations, [and t]he President is the Constitutional Executor of the laws, [which include o]ur treaties, and the law of nations . . . . It is consequently bound, by faithfully executing the laws of neutrality, when that is the state of the Nation, to avoid giving a cause of war . . . . [And since o]ur Treaties and the laws of Nations form a part of the law of the land, . . . [the President has both] a right, and . . . duty, as Executor of the laws . . . . [He has a duty] to do whatever else the laws of Nations . . . [and ‘Treaties’] enjoin”); *supra* notes 95, 115; see also *The Nereide*, 13 U.S. 388, 423 (1815) (“the court is bound by the law of nations which is a part of the law of the land”). In *Filartiga*, in response to an argument that customary international law “forms part of the laws of the United States only to the extent that Congress has acted to define it,” the Second Circuit panel responded appropriately: “[t]his extravagant claim is amply refuted by the numerous decisions applying rules of international law uncoded in any act of Congress” and “[a] similar argument was offered to and rejected by the Supreme Court in *United States v. Smith* [in 1820] and we reject it today. Federal jurisdiction over cases involving international law is clear.” *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980). Clearly, *Filartiga* had already rightly rejected the type of argument made by Judge Kavanaugh in *Al-Bihani*.

118. See PAUST, *LAW OF THE UNITED STATES*, *supra* note 28, at 208–24, 255–84 nn.187–467.

119. *Fletcher v. Peck*, 10 U.S. 87, 133 (1810) (Marshall, C.J.).

120. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J., Ginsburg, J., Henderson, J., Rogers, J., Tatel, J., Griffith, J., concurring in the denial of rehearing *en banc*).

121. *Id.* at 3 (Brown, J., concurring).

122. See *supra* notes 99, 101; see also *supra* note 110.

123. *Al-Bihani*, 619 F.3d at 3 (Brown, J., concurring); see also *id.* at 5–6 (claiming that she is “unaware of any federal judicial opinion . . . that has ever before characterized international discourse as a traditional tool of statutory interpretation on par with legis-

"[h]owever this intuition is phrased, perhaps the majority of judges on this court are apprehensive about unambiguously rejecting it."<sup>124</sup> It is more likely, however, that if they had addressed the use of international law to interpret the AUMF, the majority of judges would have preferred to be mindful of *Hamdi* and the *Charming Betsy* and *Cook* rules, as well as the many other Supreme Court decisions that support application of the rules, and to be mindful of their duty to follow clear and venerable Supreme Court precedent in contrast to apparent ideological sophistry that is manifestly contrary to Supreme Court case law.

In a surprising display of misinformation concerning the unyielding and overwhelming number of judicial and other decisions throughout the history of the United States regarding the fact that the President and all other members of the Executive branch are bound by the laws of war,<sup>125</sup> the off-the-cuff, precatory remarks of Judge Brown about a supposed "unenforceability of international law norms as limits on the President's war-making authority,"<sup>126</sup> a supposed "normal prerogative" of the President "to observe or abrogate international obligations,"<sup>127</sup> a supposed lack of judicial power to "enforce non-self-executing or non-incorporated international law against the President,"<sup>128</sup> and a supposed authority of the President to

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lative history, usage in other domestic statutes and cases, or dictionary definitions"). But see *supra* notes 99-101. Curiously, she later opines that "[t]he only generally applicable role for international law in statutory interpretation is the modest one afforded by the *Charming Betsy* canon, which counsels courts, where fairly possible, to construe ambiguous statutes so as not to conflict with international law." *Id.* at 7. This, however, is a serious misread of the *Charming Betsy* opinion. Chief Justice Marshall stressed that an act of Congress (not merely "ambiguous" acts) "ought never" (not merely where fairly possible) be "construed to violate the law of nations if any other possible construction remains" and "*can never be construed to violate . . . rights*" under the law of nations. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 117-18 (1804) (emphasis added). Contrary to the many Supreme Court decisions using the *Charming Betsy* and the related *Cook* rules, Judge Brown also opines in manifest error that international law cannot be used "as an affirmative indicator of statutory meaning." *Al-Bihani*, 619 F.3d at 7 (Brown, J., concurring). But see *supra* notes 64, 100-105.

124. *Al-Bihani*, 619 F.3d at 4 (Brown, J., concurring).

125. See, e.g., *supra* notes 102, 110, 115-117.

126. *Al-Bihani*, 619 F.3d at 2 (Brown, J., concurring). But see *supra* notes 102-103, 110, 115-117. In deviant dicta, Judge Kavanaugh also noticeably prefers this seriously erroneous and dangerous theory. See *supra* note 115. Bias is strikingly evident in his non-judicious use of the phrase "lurking international-law." *Al-Bihani*, 619 F.3d at 36 (Kavanaugh, J., concurring). This sardonic mischaracterization of law is one that his former colleagues in the White House (for example, Gonzales, Bush, Addington, and Cheney) might have appreciated during the infamous era of serial criminality orchestrated in the White House, but it is decidedly out of place in an impartial appellate chamber within the judicial system of the United States.

127. *Al-Bihani*, 619 F.3d at 7 n.6 (Brown, J., concurring). But see *supra* notes 103, 110, 115-117.

128. *Id.* at 8 n.8. With respect to non-self-executing treaties, it is important to note that the President's constitutional duty is set forth in mandatory language stating that the President "shall . . . take care that the Laws be faithfully executed," not that the President will only have to comply with laws that have already been executed, or that the President can refuse to execute or can violate the laws. U.S. CONST. art. II, § 3. Concerning Supreme Court and other cases affirming the power of the President to execute treaties, see, for example, Jordan J. Paust, *Medellin, Avena, The Supremacy of Treaties, and*

faithfully execute international law as “narrowly as he believes appropriate - consistent with international law or not”<sup>129</sup> are dangerous. Judge Brown even berated the Executive for responding “ambivalently, adopting the questionable strategy of conceding Al-Bihani’s point” that the laws of war create “judicially enforceable constraints on the President’s war powers.”<sup>130</sup> Numerous cases that are easily accessible by computer-assisted research prove Judge Brown’s assertions to be wrong<sup>131</sup> and allow recognition that the Executive’s strategy in this instance appears to have been quite sensible and serving of the rule of law. In contrast, Judge Brown’s astonishing assertions appear to suspiciously echo an ahistorical, anti-constitutional, and radical ideological blueprint for a commander-above-the-law theory proffered by certain discredited members of the Bush Administration that had encouraged serial criminality<sup>132</sup>—an infamous and extremist

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*Relevant Executive Authority*, 31 SUFFOLK TRANSNAT’L L. REV. 301, 313-14 & n.46 (2008) [hereinafter Paust, *Medellin*]. In any event, with respect to the 1949 Geneva Conventions, it should be noted that, despite some disagreement, use of traditional criteria concerning the self-executing status of particular rights of individuals assures that various rights under the Geneva Conventions are self-executing. See Paust, *Judicial Power*, *supra* note 40, at 515-16. Moreover, since the Conventions reflect customary international law, the rights thereunder are also part of the customary international law of war that is also binding on the President and all members of the Executive branch. See *id.* at 517; *supra* note 110. Traditional tests concerning self-executing status include those recognizing that “shall” language is typically self-executing and, moreover, that a treaty is manifestly self-operative “whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.” *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884) (emphasis added); see also *Baldwin v. Franks*, 120 U.S. 678, 703-04 (1887) (Field, J., dissenting) (“in many instances a treaty operates by its own force . . . and such is generally the case when it declares the rights and privileges which the citizens or subjects . . . may enjoy”); *Owings v. Norwood’s Lessee*, 9 U.S. 344, 348-50 (1809) (Marshall, C.J.) (“[w]henver a right grows out of, or is protected by a treaty”) (emphasis added); Paust, *Medellin*, *supra*, at 328-29 (demonstrating why Chief Justice Roberts’ majority opinion in *Medellin* did not use authentic Supreme Court tests and even misquoted *Edye*); PAUST, VAN DYKE & MALONE, *supra* note 46, at 321-22; *supra* note 60. But see *Al-Bihani*, 619 F.3d at 15-16, 20-21 (Kavanaugh, J., concurring) (using incorrect tests preferred by Chief Justice Roberts and completely ignoring “shall” and “rights” language in the Geneva Conventions that provide self-executing status). With respect to express use of self-executing “shall” and “rights” language in many articles in the Geneva Civilian Convention, see, for example, GC, *supra* note 4, arts. 3, 5, 8, 27, 38, 48, 72-73, 75-76, 78, 80, 101, 147; Paust, *Judicial Power*, *supra* note 40, at 516 n.43; GC IV COMMENTARY, *supra* note 4, at 9, 13, 52, 56-58, 64, 70-72, 74-80, 214-15; GPW III COMMENTARY, *supra* note 4, at 23, 85, 87, 90-91, 415, 472, 484-87, 492-93, 625, 628; I COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 65, 73-74, 77, 79-82 (Jean S. Pictet ed., 1952) (“rights secured to them;” Geneva Conventions are “devoted . . . solely to the protection of the individual;” “rights which the Convention confers upon protected persons”); *id.* at 83 (“rights conferred by the Convention”); *id.* at 84 (“individual rights”). Other rights can be implied and are, therefore, also self-executing, for example, under the *Edye* and *Owings* tests noted above.

129. *Al-Bihani*, 619 F.3d at 9 (Brown, J., concurring). But see *supra* notes 102, 110, 115-117.

130. *Id.* at 2.

131. See *supra* notes 102, 110, 115-117.

132. See Paust, *Above the Law*, *supra* note 27, at 388-98. It is worth noting that adherents to the radical revisionist approach often suffer from an evident affliction termed Westlaw-phobia, perhaps especially because it is common knowledge that overwhelm-

theory that, in any event, must be continually opposed in order to assure that the widely shared expectations of our Founders, Framers, and an overwhelming number of members of the judiciary, as well as the text and structure of our Constitution will continue to prevail under a government created and bound by law.

## Conclusion

In conclusion, President Obama's *post hoc* military commissions are not "regularly constituted" or "previously established in accordance with pre-existing laws" and are, therefore, without jurisdiction under relevant international laws. They are also not constituted within a theater of war or war-related occupied territory and are, therefore, without lawful jurisdiction. Additionally, they unavoidably violate several multilateral and bilateral treaties that require equal protection of the law and, more generally, equality of treatment and are, therefore, without lawful power or authority under supreme laws of the United States. Moreover, certain procedures operative in the special tribunals violate or are highly problematic under international law and place the United States on the wrong side of history. The United States should return to prosecuting persons accused of violations of the laws of war in the United States district courts<sup>133</sup> in order to assure equality of treatment and compliance with due process guarantees that are required by international law and the United States Constitution. Our future responses to those who attack our values will be more effective if we refuse to cast those values aside.

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ing expectations of the Founders and Framers and decisions of the judiciary are in clear and unyielding opposition. See *id.* at 399 n.141; see also Paust, *In Their Own Words*, *supra* note 26, at 205, 240 n.133 (regarding shoddy, ahistorical claims of certain writers).

133. Also, see *supra* note 114, noting that recent legislation does not prohibit convening a United States district court at Guantanamo Bay. Use of this location would solve security and financial concerns with respect to the use of district courts in New York and the District of Columbia, allow full compliance with international and constitutional law, and allow the United States to adhere to its fundamental values while responding lawfully to those who commit international crimes and thereby avoid criticism from abroad and a deflation of U.S. authority during efforts to counter terrorism. Congress could expand the jurisdiction of the regularly constituted United States District Court for the Southern District of Florida to include Guantanamo Bay, but limit jurisdiction there to criminal prosecutions of U.S. and foreign accused so as to avoid denial of equal protection for the criminally accused. A jury pool could include residents in the Southern District of Florida, but there would need to be monies budgeted for additional expenses regarding their transportation, housing, and food. See also U.S. CONST. art. III, § 2 ("[t]he Trial of all Crimes . . . shall be by Jury; and . . . when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed"). A jury was used in the prosecution of Mr. Tiede in the United States Court for Berlin, which was an Article II Executive court previously constituted under an executive agreement and that had a very independent and professional Article III federal district judge, Herbert J. Stern, from the District of New Jersey. See, e.g., *United States v. Tiede*, Crim. Case No. 78-001A, 86 F.R.D. 227 (U.S. Ct. for Berlin, Mar. 14, 1979), reprinted in 19 I.L.M. 179 (1980); HERBERT J. STERN, JUDGMENT IN BERLIN (1984); Paust, *Judicial Power*, *supra* note 40, at 524-25.

